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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 585

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, GEORGE SHIMMERLIK and ALBERT T. WANTZ, individually and as officers of DOLCIN CORPORATION, *Petitioners*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dolcin Corporation, and Victor van der Linde, George Shimmerlik, and Albert T. Wantz, individually and as officers of Dolcin Corporation, pray that a writ of certiorari issue to review the decree of the Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on July 1, 1954.

OPINIONS BELOW

The two opinions of the court of appeals and the opinion in support of the dissent from the order denying the

petition for rehearing, *in banc,* have not yet been officially reported. These opinions are set forth in their entirety in Appendices B and D hereto.

JURISDICTION

The decree of the court of appeals was entered on July 1, 1954. A timely petition for rehearing before the full court, or, in the alternative, for modification of opinion, was denied as to both alternatives by separate court orders, both dated November 12, 1954. On February 3, 1955, separate opinions were issued, (1) by the majority in support of the denial of this petition, and (2) by Chief Judge Stephens in support of his view that the petition should have been granted (See Appendix D). Motions to stay certification of opinion and decree were granted by court orders of November 26, 1954, December 20, 1954, and January 20, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

PRELIMINARY STATEMENT

The Government witnesses, on whose testimony the challenged provisions of the order under review were based, had rested their conclusions with respect to the therapeutic value of the petitioners' medicinal preparation altogether on their opinions as experts. Petitioners were not permitted, on cross-examination, to confront these witnesses with contrary medical opinions as published in literature recognized by them as reliable and in general medical use, and by authors recognized by them as experts in this field of medicine. The court of appeals, on review of respondent's order, concluded that this refusal was an unlawful denial of the right of cross-examination, resting decision on *Reilly* v. *Pinkus,* 338 U. S. 269, 70 S. Ct. 110 (1949). Upon examinaton of the pertinent provisions of the record and examples of the excluded material, the court concluded, however, that such unlawful restriction of cross-examination had not "denied petitioners sub-

stantial justice", resting its conclusion on its distinction of this case from *Reilly* v. *Pinkus, supra,* and, by footnote, inviting comparison with Fed. R. Civ. P. 61.

On review of respondent's order, the court granted petitioners' motion for leave to adduce additional evidence, but, *sua sponte,* also directed that the order under review be enforced, pending the completion of the proceedings before the respondent and final judicial review, if any.

QUESTIONS PRESENTED

I.

May the court of appeals speculate that the exclusion from the record of answers to questions put to witnesses on cross-examination, and found by the court to have been unlawfully excluded, was harmless error on the basis of a record which is devoid of any indication of the character of the excluded material?

II.

(a) Does the court of appeals have the power to direct enforcement of a Federal Trade Commission order found by the court to be based on an incomplete record, pending the completion of the record and termination of proceedings on the completed record? If so—

(b) Does the record before the court establish a public interest which would require such drastic restraint upon these petitioners?

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. § 45; and Section 13, 52 Stat. 111, 15 U.S.C. § 53.

In view of the length of their pertinent provisions, these sections are printed in their entirety in Appendix E.

STATEMENT

The proceedings before the respondent culminating in issuing the order under review were initiated by complaint charging false and misleading claims for the petitioners' medicinal preparation marketed under the brand name "DOLCIN." Issue was joined by general denial of the complaint. While the issues thus joined were several in number, the only issues pertinent to this proceeding are those which involve questions of therapeutic value of DOLCIN in the treatment of arthritis and rheumatism. These include two basic issues of fact—(1) the efficacy of DOLCIN in "correcting" or "eliminating" the underlying causes of arthritis and rheumatism, and (2) its value in the symptomatic treatment of these conditions, particularly pain.

The first of these has never been an issue in fact. While petitioners have protested that none of their advertising material was reasonably susceptible to a construction that it promised correction of the underlying causes of arthritis and rheumatism, they have, nevertheless, from the beginning, expressed their willingness to revise, and have substantially revised, their advertising so as to avoid implications of cure of the underlying causes of these conditions. (J. A., pp. 85-9, 603, 657, 664-5, 713). Therefore the *central issue* of the whole proceeding is the efficacy of DOLCIN in the symptomatic treatment of arthritis and rheumatism, particularly its value for relieving pain, stiffness, swelling, and the reduction of fever. This statement is restricted to matters bearing on that basic issue.

DOLCIN consists of a formulation of specified proportions of acetylsalicylic acid (aspirin) and calcium succinate, prepared in tablet form. Each tablet contains 3.7 grains of aspirin and 2.8 grains of calcium succinate. The directions for use of DOLCIN, appearing on its label in compliance with the requirements of the Federal Food, Drug, and Cosmetic Act, direct users to take from 12 to 24 tablets daily, depending on the severity of the arthritic

and rheumatic symptoms. Such dose supplies from 45 to 90 grains of aspirin and from 34 to 67 grains of calcium succinate daily.

Petitioners have claimed, and insist they are entitled to claim, that, *when taken as directed,* DOLCIN will relieve the pains of arthritis and rheumatism and, in many cases, stiffness and swelling, and will reduce the fever which accompanies some of these conditions.

Respondent has found that the succinate ingested, when DOLCIN is taken as directed, has no therapeutic value in the symptomatic treatment of arthritis and rheumatism. (J. A. 65). It has further found that DOLCIN

> "contains acetylsalicylic acid in an amount insufficient to relieve the severe aches, pains and discomforts attendant upon arthritic and rheumatic conditions", [but that such amount] "may, however, function as an analgesic and antipyretic to a sufficient extent to afford temporary relief to the minor aches and pains accompanying arthritis and rheumatism." (J. A. 65)

Respondent then included a provision in its order, based, in the main, on the findings as quoted, directing petitioners to cease and desist, among other things, from representing—

> "(c) that said preparation will afford any relief of severe aches, pains, and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches, pains, or fever." (J. A., p. 68)

On review, the court of appeals modified this provision so as to read—

> "that said preparation will afford significant relief of severe aches, pains and discomforts or permanent relief of any aches, pains and discomforts of

rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording relief of aches, pains or fever within the foregoing limits;" (Opinion, p. 13)

The Commission's findings, both with respect to the lack of efficacy of succinate as well as the limited effect of aspirin in the symptomatic treatment of arthritis and rheumatism are rested altogether on opinions of experts who based their medical conclusions with respect to such efficacy on their general knowledge and, in the main, on their familiarity with literature.

Petitioners presented extensive evidence to the effect that, even on the assumption that succinate had no value, their claims for their product were justified on the basis of its aspirin content alone, since a daily dose of from 45 to about 90 grains of aspirin was considered generally by the medical profession as being the proper amount for the relief of arthritic and rheumatic symptoms including, particularly, severe pains, stiffness, swelling, and the reduction of fever.

In an effort to establish a record basis for their claims based on a daily dose of from 45 to 90 grains of aspirin alone, petitioners also sought to confront those witnesses on whose opinions the respondent's contrary findings are based with contradictory medical conclusions. These were found in literature recognized by these witnesses as authoritative and in general medical use, as published by authors recognized by them as qualified experts in this field. Petitioners were denied the right to so confront the respondent's witnesses with such contrary medical opinions.

On judicial review of respondent's order, the court of appeals concluded that this denial was an unlawful denial of the right of cross-examination. However, the court affirmed the order, as modified by it, stating that—

> "On the whole record, we cannot say that the trial examiner's rulings on these matters denied petitioners substantial justice, or warrant reversal of the order." (Opinion, p. 9)

The court of appeals also granted petitioners' motion for leave to adduce additional evidence and directed that such evidence be received by the respondent. However, in that connection, the court, *sua sponte,* also directed enforcement of the order, as modified, pending the conclusion of the proceeding before the respondent. (Opinion, p. 13).

In view of the extreme importance of the two questions raised by the court's action, the petitioners moved the court of appeals for rehearing of the case before the full court, or, in the alternative, for a revision of its opinion so that (1) the petitioners would be accorded an opportunity for full cross-examination of the witnesses on whose testimony the challenged findings are based in order to insure a complete record on the central issue as stated, and (2) the respondent's order would be set aside pending a consideration of the issues on a completed record in order that petitioners may be spared the irreparable injury which would follow, and because of the absence of any public interest requiring such drastic restraint *pendente lite.*

While this motion was pending, the original panel, *sua sponte,* issued the following order—

> "It is ORDERED by the Court sua sponte that the opinion filed herein July 1, 1954 be, and is hereby, amended by striking out the following sentence in lines 16 and 17 on page 10:
>
> > 'Such agencies are not bound by the ordinary rules of evidence.' "

Thereafter the full court denied our petition. Chief Judge Stephens was joined by Circuit Judge Wilbur K. Miller in dissenting. Circuit Judges Danaher and Bastian

did not participate. Both the majority and the minority issued opinions explaining their action on this petition (See Appendix D).

This Court's determination, at this time, of these questions is essential in order to insure a completed record consistent with this Court's holding in *Reilly* v. *Pinkus, supra,* and to avoid unlawful and irreparable injury to petitioners.

ARGUMENT

I. The Court of Appeals Exceeded Its Authority in Speculating as to the Effect of the Admittedly Erroneous Denial of the Basic Right of Cross-Examination.

All of respondent's witnesses confined their testimony to expressions of medical opinion. The opinions thus expressed were the sole basis for the Commission findings which support the pertinent provisions of the order under review. The trial examiner repeatedly refused to permit petitioners to cross-examine these expert witnesses by confronting them with contradictory medical opinions by recognized authorities published in reputable scientific journals. The Commission affirmed these rulings.

On review, the court below concluded that it was "error to exclude such questions by blanket rule" and that the examiner "thus erred in the instant case." (Opinion, p. 7). However, instead of sending the case back for further proceedings to correct the errors, the court below went on to speculate, without having the slightest notion of what the answers to such questions might have been, saying "we cannot say that the trial examiner's rulings on these matters denied petitioners substantial justice, or warrant reversal of the order." (Opinion, p. 9). However, the court's own example of harmlessness reveals the contrary result and points up the degree of speculation.

On page 8 of its opinion the court quotes the following from *Comroe's Arthritis,* the most authoritative text on the subject matter under consideration—

> "Salicylates are the best of the analgesics in rheumatoid arthritis; aspirin (acetyl salicylic acid) and sodium salicylate are the most commonly used preparations."

and then says—

> "This statement seems to us of no significant help to petitioners' case. Most witnesses readily agreed that aspirin was best for relieving the less severe pains of arthritis and rheumatism." (Opinion, p. 9)

The foregoing would indicate an impression on the part of the court that the pains of "rheumatoid arthritis" are among the "less severe" pains of arthritis and rheumatism. However, the contrary is the fact. They are most severe! Hence the court's own example illustrates the extent of the harm done in restricting cross-examination, because the example cited negates the court's finding that the preparation does not "significantly" relieve severe pains, once it is understood that rheumatoid arthritis is accompanied by severe pains.

The extent of the prejudice is further illustrated by other examples of medical opinion when it is assumed, as it must be assumed for purposes of present consideration, that the witnesses on whose opinions the challenged provisions of the order are based, would have accepted them as correct opinions. Some of these are—

> "Salicylates are the most satisfactory for the relief of pain . . . Salicylates are indicated for the relief of pain." *The Physiotherapy Review,* Volume 15, No. 3, p. 98.

* * * * * *

> "The drug of choice in the treatment of rheumatoid arthritis is salicylate . . . Salicylate is a relatively innocuous drug, and the patient with long-standing rheumatoid arthritis has confidence in it. Time and again patients have stated that acetylsalicylic acid [aspirin] is the only drug which has helped them." *Journal of the American Medical Association,* Sept. 10, 1949, p. 126.

* * * * * *

"For the control of pain there is no drug that stands up month after month as well as acetylsalicylic acid [aspirin]." *Oxford Monographs on Diagnosis and Treatment of Arthritis,* Volume VI, p. 172.

* * * * * *

"Now coming to drug therapy, we deal first with drugs that relieve pain. Under this heading we put salicylates first, and acetyl salicylate is the old standby. Most rheumatoid patients take a daily quota of it, anywhere from 40 to 60 grains or even more a day." *New York State Journal of Medicine,* Vol. 41, No. 7, 1941, p. 3.

* * * * * *

"The salicylates from this time [1876] have remained the single most valuable remedy, and do, in a majority of cases, serve as almost a specific for relieving joint pain and discomfort associated with acute rheumatic fever." *Comroe's Arthritis,* 5th Edit., p. 610.

These examples clearly negate any finding of "no value", or the modified provision of the order of "no significant value".

It is readily apparent from the foregoing that the finding of harmless error in this case is in direct conflict with the holding by this Court in *Reilly* v. *Pinkus,* 338 U. S. 269 (1949), and decisions by other courts of appeal of like questions.

In *Reilly* v. *Pinkus* this Court decided, as has the court below, that denial of an opportunity to cross-examine expert witnesses who have given opinion evidence by confronting them with contrary or different medical opinions as published in recognized literature was error. There, too, the Government raised the question of harmless error and on a factual situation where there was considerably less occasion for speculation than in this case. This Court rejected the argument of harmless error and in doing so said in part—

"It is also contended that the error in restricting cross-examination was harmless here because the

memorandum of the fact-finding official indicated that he had read the excluded materials and would have made the same adverse findings had the materials been held admissible. *But the object of using the books on cross-examination was to test the expert's testimony by having him refer to and comment upon their contents. Respondent was deprived of this opportunity. The error of this deprivation could not be cured by having the fact-finder subsequently examine the material.*" (338 U. S. at pp. 276-6) (Emphasis ours)

In *Powhatan Mining Co. et al.*, v. *Ickes*, 118 F. 2d 105, 110 (C. A. 6th, 1941), the Court of Appeals for the Sixth Circuit considered the question of harmless error, the Government having contended that the record was adequate to support the challenged order wholly apart from the errors committed. In rejecting that contention the Court said in part—

"One who has been denied access to information or deprived of the privilege of cross-examination on pertinent matters is not in a position to make an offer of proof as to those matters. *Likewise, a reviewing court cannot know what a full hearing might have shown and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling.*" (Emphasis ours)

Particularly in point is *Carter Products, Inc.* v. *Federal Trade Commission*, 201 F. 2nd, 446, 454 (C. A. 9th, 1953); judgment vacated on other grounds, 346 U. S. 327 (1953). In that case this respondent's order, issued with respect to a medicinal preparation where its efficacy was also the central issue, was challenged on grounds, among others, of unlawful restriction of cross-examination. This challenge of the order was resisted by this respondent on the ground that there was ample evidence in the record to sustain the findings in the order. The court rejected that argument and vacated the order, saying in part—

"It is argued that there was ample evidence from other quarters to sustain the findings and order of the

Commission, hence the rulings, even if wrong, were not prejudicial. We are of opinion, however, that *the cumulative effect of these unjustifiable restrictions on the cross-examination of key witnesses for the Commission was to deprive petitioner of a fair hearing. Such being the case the court is not disposed to speculate as to what would have been the outcome had a fair and impartial hearing been accorded.*" (Emphasis ours)

Another case in point is *National Labor Relations Board* v. *Burns*, 207 F. 2d 434 (C.A. 8th, 1953). In that case the Government argued that the error of excluding an answer to a single question should be ignored as harmless since the witness' answer would not have changed the results "for the credited testimony which was received, and the surrounding circumstances which corroborated it, were too cogent in character to be overborne by the rejected evidence . . ." The Court rejected this argument with the terse statement "We do not agree." It continued on page 436 of the opinion as follows—

> "In *Donnelly Garment Co.* v. *National Labor Relations Board*, 8 Cir., 123 F. 2d 215, 224, this Court said:
>
> 'That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. * * * That the Board would or might have reached no different conclusion had the rejected evidence been received, is entirely beside the point. The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered. See *National Labor Relations Board* v. *Thompson Products, Inc.*, 6 Cir., 97 F. 2d 13, 15; *Foote Bros. Gear & Machine Corp.* v. *National Labor Relations Board*, 7 Cir., 114 F. 2d 611, 621.'
>
> What was said in that case was a correct statement of the law."

It is respectfully submitted that the holding of the court below in the instant case is contrary to the decisions in the cases referred to and the cases relied on by those courts.

Nor does the court's invitation for comparison of its holding with Rule 61 of the Federal Rules of Civil Procedure provide any basis for its action. It is obvious that this rule can have no application to cases such as the instant case for the reason that the material which may be the basis for determining harmlessness is not available to the court. It is clear that this rule was intended to apply to situations where "evidence" erroneously excluded can be examined in the record before the court when it is called upon to determine whether "substantial justice" has been accorded.

In indulging in such speculation in the instant case, the court below has so far departed from the permissible scope of judicial review of administrative proceedings that the exercise of this Court's power of supervision is warranted and required. Such a departure from so fundamental a rule of evidence would, if uncorrected, provide the basis for confusion and inconsistency in the application of the principles as laid down by this Court in *Reilly* v. *Pinkus, supra.* Only resolution by this Court of the question of proper application of these principles in the instant case can prevent such results.

II. The Court's Unprecedented Action in Ordering Enforcement of an Order Based on an Admittedly Incomplete Record Is Unlawful.

The court below granted petitioners motion for leave to adduce additional evidence before the Commission. However, instead of simply remanding the cause for further proceedings consistent with its opinion, the court went further and affirmed the respondent's order, as modified, and ordered its enforcement pending further proceedings.

The stated grounds for this unprecedented action are that—

> "The order of the Commission—as here modified—is amply supported *by the present record.* * * * We see no need to delay finalization of the modified order throughout the taking of additional evidence." (Opinion p. 15) (Emphasis ours)

The authority for such action is asserted to be specified provisions of Section 5(c) of the Federal Trade Commission Act, concerning which the court said—

> "Section 5(c) provides that the court may order additional evidence to be taken 'upon such terms and conditions as to the court may seem proper.' We think a proper condition here is that the order of the Commission—as here modified—become final as though this were a simple affirmance. 15 U.S.C. § 45(g) (1952)."

This holding presents a novel question not anticipated by the parties and represents strictly *sua sponte* action. To the best of our knowledge, it is without precedent in the whole field of administrative law and, we submit, raises a substantial constitutional question of due process.

The provision of Section 5(c) relied upon by the court does not include the authority for such action. It merely contemplates that the additional evidence ordered to be received by the Commission "be adduced *upon the hearing* in such manner and upon such terms and conditions as to the court may seem proper." (Emphasis ours). There is a vast difference between prescribing the manner, terms, and conditions for adducing evidence at "the hearing" on the one hand, and finalizing an administrative order upon an admittedly incomplete record, on the other. The provision relied upon obviously includes only the former.

The court also cites Section 5(g) of the Act in support of its ruling, but without indicating how these provisions apply. It is respectfully submitted that not only do the provisions of that Section fail to sustain the court's ruling, but, on the contrary, they are at variance with it. This Section deals with the finality of Commission orders and specifies the time when such orders shall become final. The provi-

sions of the several subsections obviously contemplate proceedings based on a *completed record.*

Furthermore, the court's ruling is contrary to the pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1009(e). Section 10(e) of that Act prescribes the court's functions on judicial review of administrative orders. It requires, among other things, that the court "review the whole record or such portions thereof as may be cited by any party." Obviously, the contemplated review does not include a review and finalizing of an order on an incomplete record.

The court's holding is also inconsistent with judicially established principles that judicial review be "on the whole record." Implicit in this principle is, of course, the concept that once the court has determined that the record is not complete, the order must be set aside and remanded for further proceedings. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 71 S. Ct. 456 (1951); *National Labor Relations Board* v. *Pittsburgh S. S. Co.,* 340 U.S. 498 (1951). The holding is also inconsistent with legal principles in that it will encourage "piecemeal" review which is condemned by numerous decisions of this court. See cases collected and cited in footnote 3 to Justice Black's dissent in *Federal Trade Commission* v. *Minneapolis Honeywell R. Co.,* 344 U.S. 206, 73 S. Ct. 245 (1952).

It follows that the court's holding that the order be enforced pending completion of the proceedings is contrary to law.

However, assuming, *arguendo,* that the court does have the power to direct enforcement of an order based on an incomplete record; then the holding is, nevertheless, unlawful because the record before it in the instant case fails to provide a lawful basis for exercising such power. The only basis shown in the court's opinion for enforcement of the order based on the incomplete record is a statement that "the public interest in the rapid suppression of misleading medical advertisements is obvious." This, we submit, begs

the question. In the first place, the record, as it now stands, as well as the court's finding that additional evidence should be received, negates any suggestion that the advertising claims under consideration have been *finally* found to be misleading." The court's very action of directing that the additional evidence be received necessarily implies that the basic findings might well be different and that the Commission may come to a different conclusion. Furthermore, the record fails to provide a factual basis for finding the existence of the kind of public interest which would warrant such drastic restraint upon petitioners pending further proceedings. This holding by the court is, in effect, an injunction *pendente lite*, and the principles governing these cases are therefore applicable.

It is well established that a restraint of the character as here imposed upon the petitioners is not justified except in cases of urgent necessity and upon a showing that actual, positive, substantial or great and irreparable injury would result from the maintenance of the *status quo*. (28 American Jurisprudence, Injunction § 29, and cases therein cited)

Congress has prescribed the manner in which the public's interest may be protected pending issuance of a final order by the Commission (Federal Trade Commission Act, Sec. 13(a), set forth in its entirety in Appendix E hereof). This law requires that questions of need for protection of public interest, pending conclusion of administrative proceedings before the Commission, be raised by, and resolved upon, an application by the Commission to the appropriate United States District Court for an injunction "whenever the Commission has reason to believe" that this "would be to the interest of the public." It confers jurisdiction upon the district court to resolve all issues of fact and law required to be resolved in determining the need for restraint pending conclusion of the administrative proceedings.

The court below ignores this statutory provision. It has thus denied these petitioners their right to a proper showing before a federal district court on the question of public interest. Upon such a hearing, the petitioners would readi-

ly be able to demonstrate absence of any public interest requiring such drastic restraint. This they would be able to do even on the assumption that the value of DOLCIN in treating arthritis and rheumatism is only the value of its aspirin content, by establishing the facts as hereinafter summarized.

As pointed up previously, the recommended daily dosage of ordinary aspirin is from 45 to 60 grains, the limitation being by reason of the fact that simple aspirin is not as well tolerated as the succinate-salicylate combination in the DOLCIN formulation.

In "COMROE'S ARTHRITIS" (5th Ed., 1953), at page 19, it is said—

> "It has been estimated that over 10,000,000 people (at least 1 in every 20 persons) in the United States have some form of rheumatic disease."
>
> • • • • •
>
> "Unfortunately, a large percentage of individuals affected by the rheumatic diseases receive no medical treatment or treat themselves."

It must be assumed for purposes of present consideration that such "public interest" as may be involved in this case is with respect to those persons who buy DOLCIN directly from their drugstore and are not under the supervision of a doctor. The question of public interest would, therefore, turn on whether these persons would be fairly dealt with if they were induced by petitioners' ads to take DOLCIN as directed. The authorities suggest not only that they would be fairly dealt with, but that this would be, indeed, highly desirable.

Upon a hearing had in a district court on whether an injunction would be in the public interest, petitioners would be able to demonstrate the value of such treatment by medical literature and other evidence. Their showing would be consistent with the published conclusions based on a carefully controlled experiment in which the relative value in the treatment of arthritis and rheumatism of cortisone,

ACTH, and aspirin were compared. According to the article reporting on this experiment as published in the British Medical Journal for May 29, 1954, one of the outstanding medical publications of the British Empire, the investigators found the following similarity in effectiveness of the drugs used, including aspirin—

> "Observations made one week, eight weeks, thirteen weeks, and approximately one year after the start of treatment reveal that the two groups have run a closely parallel course in nearly all the recorded characteristics—namely, joint tenderness, range of movement in the wrist, strength of grip, tests of dexterity of hand and foot, and clinical judgments of the activity of the disease and of the patient's functional capacity. The haemoglobin level and blood sedimentation rate were slightly more favourably influenced by cortisone, but in no other respect do the two groups differ materially.
>
> On each form of treatment the disease was judged at the end of one year to be inactive, or only slightly active, in about three-quarters of the patients, and on each treatment some two-fifths of the patients were regarded as capable of normal work and activity. For practical purposes, therefore, there appears to have been surprisingly little to choose between cortisone and aspirin in the management of these 61 patients in the early stages of rheumatoid arthritis."

There are literally scores of medical reports published within the last two or three years to the same or similar effect. That then is the kind of relief sufferers who respond to the DOLCIN advertisements will receive. Is this desirable?

A report, including reports on drug therapy in the treatment of arthritis and rheumatism as prepared by the Committee of the American Rheumatism Association, which includes a complete review of all available data and literature, concludes, after commenting on the efficacy of the various agents, by saying—

> "Whatever agent or agents are employed, it is evident from various studies that early therapy and long-

continued therapy with salicylates are desirable." ("Primer on Rheumatic Diseases," May 23, 1953, issue of Journal of American Medical Association, at page 330)

Obviously, such and many other similar conclusions would never induce any district judge to find that the interest of these people required that petitioners be restrained from selling DOLCIN on the basis of their present, more conservative, claims of relief of arthritic and rheumatic pains and, in many cases, stiffness and swelling.

On the other hand, the irreparable injury to petitioners from the restraints imposed upon it can be readily demonstrated. These petitioners will be able to show, if this petition is granted, that competing advertising material for preparations never accepted by the medical profession for the treatment of arthritis and rheumatism contains claims far beyond any claims which petitioners are making, or desire to make, for the DOLCIN treatment recommended, which is entirely consistent with accepted medical practice; that such claims and similar claims for other similar products have been brought to the respondent's attention repeatedly; and that the respondent to this day has not taken any action to stop this practice, as it may by authority of Section 13, as noted above. The fundamental unfairness in requiring these petitioners to cease their advertising claims in the face of such a competitive atmosphere, and the fact that they would suffer irreparable damages from loss of business under these circumstances, is obvious.

It follows that the action by the court below, directing that the order under review be enforced pending completion of the proceedings is unlawful in that no factual basis has been, nor could be, established for such restraint even if the court had the power to issue such an order upon a proper showing.

CONCLUSION

The decision below is in conflict with principles established in applicable decisions of this Court and other courts of appeals, and involves important questions of federal law. Further, the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL F. MARKEL
WAYNE K. HILL
Attorneys for Petitioners
522 Munsey Building
Washington 4, D. C.

APPENDIX

APPENDIX

APPENDIX A

Filed: January 23, 1952.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 5692

In the Matter of

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, GEORGE SHIMMERLIK, and ALBERT T. WANTZ, individually and as officers of DOLCIN CORPORATION

Initial Decision

By ABNER E. LIPSCOMB, *Hearing Examiner.*

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on August 18, 1949, issued and subsequently served its complaint in this proceeding upon respondents Dolcin Corporation, a corporation, and Victor van der Linde, George Shimmerlik, and Albert T. Wantz, individually and as officers of said corporation, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; and said hearing examiner, having duly considered the record

herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

Findings as to the Facts

Paragraph One: Respondent Dolcin Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 683 Fifth Avenue, New York, New York.

Respondents Victor van der Linde, George Shimmerlik, and Albert T. Wantz, individuals, are now and at all times mentioned herein have been directors of said corporate respondent, and respectively, the president, treasurer, and secretary therof, and with their offices located at the principal place of business thereof; and are now, and at all times mentioned herein have been, in control of the management, policies and operation of the said corporate respondent, including the acts, practices and methods herein found.

Paragraph Two: The respondents are now, and for several years last past have been, engaged in the offering for sale, sale and distribution in commerce, among and between the various States of the United States and in the District of Columbia, of a certain medicinal preparation designated "Dolcin," which is a "drug" within the meaning of the Federal Trade Commission Act, and for which the formula and directions for use are as follows:

Formula:

Each tablet contains:

Calcium Succinate	2.8 grains
Acetylsalicylic acid	3.7 grains
Plus excipients.	

Directions for Use:

"GENERAL DIRECTIONS

"Read these directions Carefully so that you may learn how you can get Greatest Benefit from DOLCIN.

"In cases of long-standing, where joint-stiffness and pain are acute before starting the DOLCIN Treatment, it is recommended that twelve DOLCIN Tablets be taken daily (3 tablets, 4 times, as explained above) for at least one week, and until the acute symptoms are relieved. Follow this with eight tablets daily for two or three months . . . and then four tablets a day for two months. *It is most important to continue taking DOLCIN for a few months after relief has been obtained,* for it is an established fact that Rheumatic activity usually persists in the body for considerable period after the acute symptoms have subsided.

"Where stiffness of joints is not extreme and muscular pains are not severe . . . or where the case is not one of long standing . . . take eight DOLCIN Tablets daily for the first month (two tablets with a glass of water at each meal and two tablets before retiring for the night). After one month, reduce doses to four tablets daily (one tablet, four times a day) for three months. Then take two tablets daily (one morning, one night) for three months even though all symptoms have disappeared long before.

"It makes no difference whether the DOLCIN at mealtime is taken before, during or after eating . . . But Take Your DOLCIN Regularly. . . . . "

Respondents cause the said product, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in the said product in commerce between and among the various States of the United States and in the District of Columbia. Respond-

ents' volume of business in such commerce is substantial, sales of the drug preparation "Dolcin" in 1948 being in excess of one million dollars.

Paragraph Three: In the course and conduct of their business, respondents, subsequent to March 21, 1938, have disseminated and caused the dissemination, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, of certain advertisements of the drug preparation "Dolcin," for the purpose of inducing, and which were likely to induce, directly or indirectly, its purchase; and have disseminated and caused the dissemination of such advertisements for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said drug preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. Among such advertisements were radio broadcasts disseminated subsequent to October 7, 1948, by various broadcasting stations, and advertisements published in various professional and trade journals having national circulation and in various pamphlets and circulars distributed throughout the United States. Typical of the statements and representations contained in such advertisements are the following:

"HERE IS WHAT YOU SHOULD DO ABOUT
YOUR ARTHRITIS AND RHEUMATISM—

1. *Get a bottle of* DOLCIN tablets and start your DOLCIN treatment at once.

2. *What is DOLCIN?* It is a product which is the result of a new, scientific approach to the treatment of rheumatism and arthritis; it is a development of fundamental biochemical research.

   DOLCIN tablets contain ingredients which medical authorities accept as being correct in the treatment of symptoms of rheumatism and arthritis. DOLCIN is made under strictest laboratory control and is constantly tested for purity of ingredients and for pharmaceutic uniformity.

3. *What does DOLCIN do?* The DOLCIN treatment combines Prompt Relief of pain, Physiological Action, freedom from ill-effects and Low Cost. Thus DOLCIN fills a long-sought objective in the therapy of the Rheumatic State. Rheumatism in its various forms . . . arthritis, myositis, fibrositis and certain forms of bursitis, sciatica and neuritis . . . is, by far, the most prevalent and disabling of all chronic ailments. Rheumatism is not merely a disorder of joints and muscles, but is generally accompanied by disturbances in internal function (metabolism). It is, therefore, essential that treatment be directed not only toward relief of pain, but also to the disturbances in metabolism which constitute a very important part of the background of the Rheumatic State.

   DOLCIN therapy not only provides Prompt Relief from pain due to symptoms of rheumatism and arthritis, but DOLCIN contains catalysts which, extensive scientific research has recently proved, play a vital role in the metabolic processes which are disturbed in the Rheumatic and Arthritic State.

4. *I never heard of DOLCIN. How do I know it's good?* Up to a short time ago, DOLCIN was supplied only to hospitals, clinics and to doctors engaged in research and in private practice. Now, however, it is being sold direct to sufferers from rheumatism in all its forms. DOLCIN is becoming more widely-known every day as former victims of arthritic and rheumatic pains pass the good news along.

   DOLCIN has been tested and proved to be efficacious and reliable; it is being used with success in great hospitals, clinics and prescribed by an increasing number of doctors.

5. *All right, but must I get a doctor to prescribe DOLCIN before I use it?* No. You do *not* need a doctor's prescription for you to take the DOLCIN treatment.

   DOLCIN is Non-Toxic. . . . It will *not* hurt the heart or any other organ. A study made in a university famous all over the world confirms ex-

tensive earlier clinical proof that DOLCIN is Non-Toxic.

DOLCIN is designed for Prompt Action. The Lack Of Harmful Effects makes DOLCIN ideal for prolonged administration such as is frequently necessary in chronic and severe cases of rheumatism and arthritis. This freedom from hazard and its effectiveness are Important Advantages of DOLCIN over some medications which are considerably more expensive and which may have harmful effects on the body on prolonged administration.

6. *Is DOLCIN suitable for use by people who are adversely affected by acetyl-salicylic acid (aspirin)?* DOLCIN's ingredients, combined in proper proportions, enhance the good effects of each while, at the same time, they minimize aspirin's sometimes-harmful effects.

   Remember, DOLCIN is Non-Toxic . . . it will *not* harm the heart or any other organ.

7. *Is DOLCIN just another palliative . . . a product for relieving pain for a few hours?* The answer is very definitely that DOLCIN is *not* just a palliative masking pain and discomfort for a few hours. DOLCIN is designed to Relieve Pain Promptly but, also, the DOLCIN treatment is directed to the disturbances in metabolism which are a very important part of the background of the Rheumatic State, and is designed to give prolonged relief from symptoms.

8. *How long will it take to relieve pain and for symptoms of arthritis and rheumatism to disappear?* No two cases respond exactly alike. Generally speaking, the longer the person has suffered from the disease the longer it will take to get results. We know of many cases, where the pain was severe but where the symptoms had only been of few months' standing, in which all pain disappeared in a few hours, other cases take longer.

9. *For how long should I take DOLCIN?* As carefully explained in the directions packed with each

bottle, it is most important to continue taking a few DOLCIN tablets every day for a few months after the pain and other symptoms have disappeared; this is to help prevent any recurrence, by giving the body time to get rid of disturbances in internal function which accompany the disease.

10. *How much DOLCIN shall I take?* With every bottle there is a sheet of information and Directions. Study this thoroughly. Remember, because DOLCIN is non-toxic, it is better to take more tablets than necessary rather than fewer . . . and much better to continue the treatment for some time after *all* symptoms have disappeared. You don't want your pains and stiffness back again, do you?

11. *Is DOLCIN of help for children's so-called 'growing-pains'?* Yes. Growing-pains in children are often of rheumatic origin and may precede childhood's scourge, Rheumatic Fever! Any child suffering from growing-pains should be given the DOLCIN treatment at once, under a doctor's supervision.

12. *Should other treatments be used while I am taking the DOLCIN treatment?* Unless prescribed by a physician, no other medication should be, or need be, taken. Leave it to DOLCIN and Nature. Take DOLCIN regularly and give it time to work. Of course, it is natural that a case of arthritis or rheumatism which has taken years to develop cannot be relieved overnight!

13. *My doctor does not know about DOLCIN. How can he learn about it?* If you will send us his name and address, we will gladly send him full scientific data on DOLCIN.

14. *Where can I get DOLCIN?* Ask your druggist. If he has not got it in stock, order DOLCIN direct from us . . . sending your druggist's name and address, please.

15. *What does DOLCIN cost?* The most economical size is the DOLCIN-500 . . . 500 tablets last the average case more than *three months!* . . . Price $9.00.

DOLCIN-100 . . . 100 tablets for only $2.00
When you send remittance with your order, we prepay postage and insurance on the shipment.

16. DOLCIN is a tested, honest product . . . non-toxic . . . inexpensive . . . used in hospitals . . . prescribed by doctors. Many, many people are no longer suffering the pain and stiffness of arthritis or rheumatism . . . through taking DOLCIN . . . efficacious, reliable DOLCIN which is the *best friend of arthritics and rheumatics.*"

"Sometimes just a word—spoken at the right time—can alter the whole course of another person's life. Right now, here is such a word for *you*—If you suffer from arthritis or rheumatism—and that word is DOLCIN! DOLCIN is a tested new bio-chemical discovery—which many, many people throughout the country report brings swift, effective relief from the agony of arthritic and rheumatic symptoms. People who have suffered from these afflictions *for years*, report they have resumed normal occupations after taking DOLCIN. There's a scientific explanation for this. DOLCIN is more than just a pain killer—in many cases, DOLCIN actually results in prolonged remission of stiffness and discomfort. . .. "

" . . . many victims of these diseases have been able to resume normal living by taking DOLCIN. It's used in many hospitals . . . prescribed by many doctors . . . and is designed to bring you sufferers of arthritis, rheumatism, neuritis and sciatica Not temporary relief . . . but prolonged relief. . . ."

"As acetylsalicylic acid in DOLCIN is non-toxic, DOLCIN should be used instead of aspirin."

"DOLCIN is an efficacious, non-toxic and economical preparation for oral administration in relieving symptoms of arthritic and rheumatic disorders. DOLCIN . . . resulting from a new physiological approach in the therapy of arthritic and rheumatic disorders . . . combines the catalytic effect of calcium succinate and acetylsalicylic acid in non-toxic form which may be prescribed for osteoarthritis, infectious arthritis and rheumatoid arthritis as well as for rheumatic fever and various forms of neuritis and

sciatica. DOLCIN may be employed as an adjuvant to other therapeutic measures."

" . . . Remember the name DOLCIN—D-O-L-C-I-N—for relief of symptoms of arthritis, rheumatism, lumbago and neuritis."

Paragraph Four: Through the above-quoted advertisements, and other similar thereto, respondents have represented, directly or by implication, as follows:

1. That the drug preparation "Dolcin" constitutes an adequate, effective and reliable treatment for, will arrest the progress, correct the underlying causes, cure and prevent the recurrence of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis and all other forms of rheumatism and arthritis and the symptoms and manifestations thereof;

2. That the drug preparation "Dolcin" is inexpensive, in that it is "economical" to purchase and of "low cost";

3. That the drug preparation "Dolcin" constitutes an adequate, effective and reliable treatment for so-called "growing-pains" in children, and that its use will prevent rheumatic fever, which may be preceded by such pains;

4. That the drug preparation "Dolcin" is non-toxic; that it can be used over prolonged periods of time without harmful effects on the body; that aspirin does sometimes produce harmful effects; and that persons adversely affected by aspirin can take "Dolcin" with safety.

Paragraph Five: The terms "arthritis" and "rheumatism" are general terms, sometimes used interchangeably, which may refer to any of many diseases or pathological conditions including, among others, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, and bursitis, all of which are characterized by one or more of such symptoms or manifestations as pain, stiffness, and inflammatory and destructive changes in the joints and tissues

of the body. These pathological conditions are of known as well as unknown origin. Examples of those of unknown origin are rheumatoid arthritis, osteomyelitis and rheumatic fever. Examples of such conditions of known causes are infectious arthritis, such as arthritis of syphilis, arthritis of gonorrhea, and arthritis associated with pneumonia and tubercular infections. In addition there are forms of arthritis, such as gout, which are connected with disturbances of metabolism.

Rheumatic fever is an inflammatory disease of unknown cause, of which the most common manifestations are fever, pain, and swelling and inflammation in the joints, often accompanied by rapid heartbeat, profuse sweating, increase in white corpuscles and other changes in the blood. Rheumatic fever tends to be complicated, and is the chief cause of death from heart disease in children between the ages of 5 and 19. Although "growing-pains" in children may be symptomatic of the early stages of rheumatic fever, they also may be due to many other and less serious causes, such as playing too hard, and running too much, and do not constitute a disease.

Fibrositis is an irritation or discomfort, a syndrome of pain and stiffness which arises in the fibrous tissues of the body.

The term "myositis" is used generally by doctors and laymen to refer to the condition of muscular rheumatism or fibrositis. It is of varying severity, sometimes mild and localized, sometimes severe and widespread.

The term "neuritis" is a general term referring to an inflammation of the nerves, and denotes many different diseases resulting from various causes, such as infections, pressure on nerves from displaced organs or structures of the body, invasion of the nerve by neoplasm or tumor, intoxication with metals or toxins, and metabolic disturbances such as the form of neuritis occurring in diabetes.

Sciatica is a common form of neuritis felt along the course of the sciatic nerve. It is not a disease, but may occur as a symptom of many different diseases resulting

from various causes, such as pressure on the sciatic nerve, a tumor in the spine, infection or inflammation of the sheath of the sciatic nerve, metabolic disturbances caused by toxins resulting from infection, fibrositis or arthritis involving the joints.

Lumbago is a form of fibrositis manifesting itself as a painful condition in the lower part of the back, of varying severity, sometimes so mild as hardly to interfere with a man's business, in other instances so violent as to render him unable to move in bed. Lumbago is associated with stiffness and muscle spasm provoked by attempts to move.

Bursitis is a form of fibrositis having specific reference to inflammation of a bursa, the fibrous sac or membrane surrounding a joint, and may result from invasion of the bursa by various germs, such as streptococcus, mycobacterium, gonococcus, and the tubercular bacillus, and from rheumatic or fibrositic inflammation.

Infectious arthritis is a form of arthritis resulting from invasion of a joint of any one of various germs, such as staphlococcus and streptococcus, which are carried to the joint through the bloodstream from a focus of infection in the body, caused by an external wound or by various infectious diseases.

Osteoarthritis refers to a disease characterized by degenerative changes in the joints and other tissues and organs of the body. The clinical phenomena associated with osteoarthritis are pain, painful stiffness associated with movement of the joint, enlargement of some joints, narrowing of joint spaces, increase in size of joint surfaces, growth of spurs and increase in the extent of margins of the joint.

Rheumatoid arthritis is a chronic, progressive, destructive disease affecting joints and organs of the body, characterized by pain, swelling, stiffness and limitation of motion in joints and deterioration of the patient's general health. This disease is accompanied by pathological changes in the joints, such as thickening of the lining membrane; production of excessive fluid in the bursa in

some instances, and absorption of fluid in others; atrophy of muscles, and sometimes destruction of portions of the bone ends, resulting in deformation of the joint. The cause of rheumatoid arthritis is unknown.

Paragraph Six. The various pathological conditions generally referred to as "arthritis" and "rheumatism" progress and develop differently. Likewise, they require different treatment, which will vary not only between different types of such ailments, but between different individuals suffering from the same ailment, and between different stages in the progress thereof. An adequate, effective, or reliable treatment for any kind of "arthritis" or "rheumatism" must, therefore, be predicated upon individual diagnosis, in order to determine whether the patient has arthritis or rheumatism, the particular kind of such ailment present, and whether it arose from a known or an unknown cause. Such a diagnosis may require any or all of the following determinations:

1. History of the patient, including information as to age, sex, marital status, occupation, chronology of the present ailment; family history, such as age and cause of death of parents and relatives; any illnesses from which the patient may have suffered previously, particularly rheumatic fever, scarlet fever and streptococcus infections;

2. Detailed physical examination of every part of the patient's anatomy; and

3. Laboratory examination, such as blood count, serological test for syphilis, urinalysis, and certain other tests as they may seem useful in the individual case, such as X-ray and analysis of fluids in individual joints.

Paragraph Seven: An adequate, effective, or reliable treatment for any of the various types of ailments included in the general terms "arthritis" and "rheumatism" may involve application of various therapeutic measures, including diet; rest or change of occupa-

tion; various types of physiotherapy, such as orthopedic or thermal procedures; and medication. Delay of proper diagnosis, with consequent failure to administer appropriate treatment, may result in the evolution of irreversible pathological changes, causing a crippled, useless joint or extremity, especially in those forms of arthritis and rheumatism known to be caused by specific infections. There is no drug, or combination of drugs, regardless of how administered, which will constitute an adequate, effective, or reliable treatment for the various forms of arthritis or rheumatism, nor is there any drug or combination of drugs which can restore to normal the pathological changes which result from arthritic or rheumatic ailments.

Paragraph Eight. The drug preparation "Dolcin" contains 2.8 grains of calcium succinate and 3.7 grains of acetylsalicylic acid, plus excipients of no therapeutic significance.

Calcium succinate, when taken orally, is converted by the liver into sugar, and no significant amount of succinate reaches the bloodstream. In order to be therapeutically operative in the body, succinates must be administered intravenously. When present in sufficient concentration to be operative, the effect of succinates on tissue metabolism is harmful. The quantity of calcium succinate contained in the drug preparation "Dolcin" is entirely too small to achieve or maintain a sufficient concentration in the body to have any effect whatever on the metabolism of the tissues.

Since calcium succinate, administered orally, is therapeutically inoperative, the only active ingredient contained in the drug preparation "Dolcin" is acetylsalicylic acid, commonly known as aspirin, the use and effect of which, as an analgesic and antipyretic, have been known for many years.

The drug preparation "Dolcin" contains acetylsalicylic acid in an amount insufficient to relieve the severe aches, pains and discomforts attendant upon arthritic and rheumatic conditions. The quantity of acetylsalicylic acid

therein contained may, however, function as an analgesic and antipyretic to a sufficient extent to afford temporary relief to the minor aches and pains accompanying arthritis and rheumatism.

Paragraph Nine: The drug preparation "Dolcin," however taken, will not constitute an adequate, effective, or reliable treatment for any arthritic or rheumatic condition, including, among others, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, and bursitis, nor will said preparation arrest the progress, correct the underlying causes, or effect a cure of any of such conditions. The drug preparation "Dolcin," however taken, will not ameliorate the aches, pains and discomforts of any arthritic or rheumatic condition to any extent beyond the temporary relief thereof afforded by its salicylate content as an analgesic and antipyretic. The drug preparation "Dolcin," however taken, will have no significant effect upon severe aches, pains and discomforts accompanying any arthritic or rheumatic condition, and will afford temporary relief of only minor aches, pains and discomforts. With the exception of such temporary relief, the drug preparation "Dolcin" cannot be depended upon to have any effect whatever upon the symptoms accompanying any arthritic or rheumatic condition, including, among others, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago and bursitis.

The drug preparation "Dolcin," however taken, will not correct disturbances in metabolism nor insure adequate functioning of the metabolic processes of the body.

Paragraph Ten: The drug preparation "Dolcin," however taken, does not constitute an adequate, effective, or reliable treatment for so-called "growing-pains" in children, nor will its use prevent rheumatic fever.

Paragraph Eleven: Since the only therapeutically operative ingredient in the drug preparation "Dolcin" is acetylsalicylic acid, commonly known as aspirin, and since, under certain circumstances, or when taken over pro-

longed periods of time, aspirin may produce harmful effects upon the body, the drug preparation "Dolcin" may be toxic to the same extent, and cannot be taken over prolonged periods of time without the danger of such harmful effects, nor can such preparation be taken safely by persons adversely affected by aspirin.

Paragraph Twelve: Since the only therapeutically operative ingredient in the drug preparation "Dolcin" is acetylsalicylic acid, commonly known as aspirin, and since the retail selling price, without prescription, of 100 tablets of the drug preparation "Dolcin" is $2.00, whereas that of 100 tablets of a well-known brand of aspirin is 59¢, while many other brands of aspirin sell for less, the drug preparation "Dolcin" is not economical, inexpensive, or of low cost.

Paragraph Thirteen: The record contains no substantial evidence to support the allegation that the administration of the drug preparation "Dolcin" over prolonged periods of time to persons suffering from rheumatic fever may result in serious hemorrhage and in death.

Paragraph Fourteen: Respondents' representations concerning the drug preparation "Dolcin," as hereinbefore found, are false and misleading in material respects; have had the capacity and tendency to mislead and deceive, and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that such representations were true, and into the purchase of substantial quantities of said drug preparation as a result thereof; and constitute false advertisements within the intent and meaning of the Federal Trade Commission Act.

Conclusion

The acts and practices of respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

ORDER

It Is Ordered that the respondents Dolcin Corporation, a corporation, and Victor van der Linde, George Shimmerlik, and Albert T. Wantz, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the drug preparation "Dolcin," or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

(a) that the taking of said preparation will constitute an adequate, effective or reliable treatment for rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition;

(b) that said preparation will arrest the progress or correct the underlying causes of, or will cure, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition;

(c) that said preparation will afford any relief of severe aches, pains, and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches, pains, or fever;

(d) that the taking of said preparation is an adequate, effective, or reliable treatment for so-called "growing-pains" in children, or that its use will prevent rheumatic fever;

(e) that said preparation may safely be taken over prolonger periods of time;

(f) that said preparation may safely be taken by persons adversely affected by aspirin; and

(g) that said preparation is economical, inexpensive, or of low cost, unless and until the retail selling price, without prescription, of such preparation shall, in truth and in fact, be less than the retail selling price, without prescription, of the only active ingredient contained in said preparation, which is acetylsalicylic acid, commonly known as aspirin;

2. Disseminating or causing to be disseminated, any advertisement by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said preparation, which advertisement contains any of the representations prohibited in Paragraph 1 hereof.

ABNER E. LIPSCOMB,
Hearing Examiner.

January 22, 1952.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: James M. Mead, Chairman, Lowell B. Mason, John Carson, Stephen J. Spingarn, Albert A. Carretta.

Docket No. 5692

In the Matter of

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, GEORGE SHIMMEL IK and ALBERT T. WANTZ, individually and as officers of DOLCIN CORPORATION

Order Denying Appeal From Initial Decision of the Hearing Examiner, Decision of the Commission and Order to File Report of Compliance

This matter came on to be heard by the Commission upon respondents' appeal from the initial decision of the hearing examiner, briefs in support of and in opposition

to said appeal and oral argument of counsel. In support of their appeal respondents have set out in their appeal brief extensive exceptions to certain of the findings as to the facts, conclusion and provisions of the order and to certain procedural rulings of the hearing examiner. These exceptions have been fully considered and denied by the Commission in a separate order issued simultaneously herewith.

This matter relates to the truth or falsity of certain claims made by respondents in advertisements of the preparation Dolcin. There is no contest as to the actual advertisements or as to the ingredients of the preparation. The contest is as to the meaning of the advertisements and the effects of using the preparation as directed.

The record shows that respondents claimed in their advertising that, in addition to providing relief from the symptoms of arthritic and rheumatic conditions, Dolcin would attack the underlying causes of the conditions themselves. An example is the following excerpt from one of respondents' advertising pamphlets:

> "7. *Is* DOLCIN *just another palliative . . . a product for relieving pain for a few hours?* The answer is very definitely that DOLCIN is *not* just a palliative masking pain and discomfort for a few hours. DOLCIN is designed to Relieve Pain Promptly but, also, the DOLCIN treatment is directed to the disturbances in metabolism which are a very important part of the background of the Rheumatic State, and is designed to give prolonged relief from symptoms."

The greater weight of the evidence is that other than aspirin none of the ingredients in Dolcin have any value in connection with arthritic and rheumatic conditions and and that the only value of aspirin taken in this connection is that it provides temporary relief from the less severe pains and fever accompanying these conditions. Respondents admit their preparation will not prevent the underlying causes, cure or arrest the progress of arthritic or rheumatic conditions. However, they do contend that it

will relieve stiffness and swelling accompanying such conditions in certain cases in addition to providing pain relief. The greater weight of the evidence is contrary to respondents' contention and fully supports the findings of the hearing examiner in his initial decision.

The record also shows that respondents claimed in their advertising that Dolcin is non-toxic, may be taken safely in large quantities over prolonged periods even by persons adversely affected by aspirin. The greater weight of the evidence shows that the aspirin in Dolcin has exactly the same effect as if taken alone and that certain persons are adversely affected by aspirin and should not take it in large quantities or over a prolonged period. Aspirin is one of the safest analgesics known and is widely prescribed by physicians in large dosages for temporary relief of pain and fever in arthritic and rheumatic conditions. Serious results from such excessive use are rare. However, less serious but undesirable effects such as headache, nausea, vomiting will occur in persons unable to tolerate aspirin. Respondents' representations to the contrary are false and deceptive as found by the hearing examiner in his initial decision.

For these reasons as well as those set out in its ruling on respondents' exceptions, the Commission is of the opinion that all of the findings as to the facts contained in the initial decision are supportable by reliable, substantial, and probative evidence of record; that the conclusion contained therein is correct; and that the order to cease and desist therein is proper upon this record and is required to provide proper relief from respondents' illegal practices; and

The Commission, therefore, being of the opinion that respondents' appeal from the hearing examiner's initial decision is of no merit and that said initial decision is appropriate in all respects to dispose of this proceeding:

It Is Ordered that the appeal of respondents from the initial decision of the hearing examiner be, and it hereby is, denied.

It Is Further Ordered that the initial decision of the hearing examiner shall on the 2nd day of December, 1952 become the decision of the Commission.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in said initial decision, a copy of which is attached hereto.

By the Commission, Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

D. C. DANIEL,
Secretary.

SEAL

ISSUED: December 2, 1952.

APPENDIX B

(Federal Trade Commission Docket 5692)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11700

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, GEORGE SHIMMERLIK, and ALBERT T. WANTZ, Individually and as Officers of Dolcin Corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On petition for review of order of the
Federal Trade Commission
Decided July 1, 1954

Mr. Michael F. Markel, with whom *Mr. Wayne K. Hill* was on the brief, for petitioners.

Mr. John W. Carter, Jr., Attorney, Federal Trade Commission, of the bar of the Supreme Court of Virginia, *pro hac vice,* by special leave of Court, with whom *Messrs. Robert B. Dawkins,* Assistant General Counsel, Federal Trade Commission, and *Donovan Divet,* Special Attorney, Federal Trade Commission, were on the brief, for respondent.

Before Bazelon, Fahy and Washington, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is a review of a cease and desist order of the Federal Trade Commission. Petitioners, the Dolcin Corporation and certain of its officers, are engaged in the manufacture of a drug—"Dolcin"—designed primarily to relieve the symptoms of arthritis and rheumatism. Each "Dolcin" tablet contains 2.8 grains of calcium succinate and 3.7 grains of acetylsalicylic acid (aspirin). Petitioners have repeatedly made far-reaching claims as to the product in their advertisements. The Federal Trade Commission, as a result, issued a complaint in August of 1949. After extensive hearings the

trial examiner found that petitioners' advertising representations were in large part incorrect. The Commission affirmed the trial examiner's findings and on the basis of them issued a cease and desist order. In essence this order forbids petitioners from representing that Dolcin (1) is inexpensive; (2) may safely be taken over prolonged periods of time; (3) may safely be taken by persons who are adversely affected by aspirin; (4) will have any effect upon arthritic or rheumatic conditions beyond affording temporary relief of minor aches, pains or fever.[1]

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[1] The Commission's order seeks to restrain petitioners from advertising as to Dolcin—

"(a) that the taking of said preparation will constitute an adequate, effective or reliable treatment for rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition;

"(b) that said preparation will arrest the progress or correct the underlying causes of or will cure, rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind or arthritic or rheumatic condition;

"(c) that said preparation will afford any relief of severe aches, pains, and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches, pains, or fever;

"(d) that the taking of said preparation is an adequate, effective, or reliable treatment for so-called 'growing-pains' in children, or that its use will prevent rheumatic fever;

"(e) that said preparation may safely be taken over prolonged periods of time;

"(f) that said preparation may safely be taken by persons adversely affected by aspirin; and

"(g) that said preparation is economical, inexpensive, or of low cost, unless and until the retail selling price, without prescription, of such preparation shall, in truth and in fact, be less than the retail selling price, without prescription, of the only active ingredient contained in said preparation, which is acetylsalicylic acid, commonly known as aspirin."

I.

Petitioners attack the Commission's order on several grounds. The first of these is that they were denied a fair hearing, in that Dolcin was made the subject of a test case to govern the status of all distributors of similar drugs: that the Commission denied petitioners the privilege of revising their advertising by stipulation; and that on the basis of the evidence taken in petitioners' case the Commission entered a cease and desist order against another distributor before it had decided the instant case, thus prejudging the matters in controversy.

The record before us does not establish the claimed unfairness. There is no showing that prior to the issuance of the Commission's complaint the petitioners had purged their advertising of the criticized claims; on the contrary, petitioners contest to this day the restrictions which the Commission then and now seeks to impose. And in any event abandonment of challenged practices does not automatically bar the issuance of a complaint. *Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321 (7th Cir.), cert. denied, 323 U.S. 730 (1944). The record does show another case involving "Sural," a similar drug put out by the Norlon Corporation, was the subject of a stipulation between the latter company and the Commission, whereby the medical evidence in the instant case would form part of the record in that case.[2] After the hearing in the present case was completed, petitioners asked for oral argument. The Norlon Company did not. The same trial examiner sat in both cases. He issued an Initial Decision in *Norlon* in January 1952 and a similar Initial Decision in *Dolcin* in the following month. In May 1952 the Commission issued a final order in *Norlon;* in June it heard argument in *Dolcin,* and issued its final order against these petitioners in December. The orders in the two cases were similar.

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[2] It was not, of course, the whole record: the nature of Norlon's advertising would have to be established.

It may be that petitioners were in some degree prejudiced by the course the Commission took: their oral argument was delivered under the handicap of a fresh precedent rendered on the same medical evidence. But administrative agencies are under congressional mandate to "proceed with reasonable dispatch to conclude any matter presented."[3] and on the facts before us we see no abuse of discretion on the Commission's part in deciding *Norlon* as soon as it was ready for decision. Petitioners made no timely motion to have the decision in *Norlon* postponed until after the argument in *Dolcin*, nor did they move for any definite form of relief after *Norlon* came down. The occurrences here do not establish bias or disqualification on the part of the Commission; certainly nothing is shown sufficient to invalidate the hearing and the subsequent decision. *Cf. Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700 (1948); *United States* v. *Morgan*, 313 U.S. 409, 420-21 (1941).

II.

Petitioners also complain of errors by the trial examiner in the conduct of the hearing. One grievance is that they attempted to cross-examine some of the Commission's expert medical witnesses concerning statements made by other experts writing in various medical publications. The trial examiner would not allow the questions. Implicit in his rulings was the theory that medical publications were hearsay which could be used upon cross-examination only if the witness had relied upon them in direct examination. Petitioners contend this was an erroneous restriction on the scope of cross-examination and that it warrants reversal. They rely primarily on *Reilly* v. *Pinkus*, 338 U.S. 269 (1949).

In that case the petitioner (Pinkus) had sent representations through the mail about "Dr. Phillips' Kelp-I-

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[3] Administrative Procedure Act, § 6(a), 5 U.S.C. § 1005 (a) (1952).

Dine Reducing Plan." The Postmaster General, after a hearing, found these representations to be fraudulent and issued an order restricting petitioner's use of the mails. At the hearing doctors had testified as experts for the Post Office Department as to the efficacy of Kelp-I-Dine. They based their opinions, at least in part, upon their reading of medical textbooks and publications. Petitioner sought to cross-examine these doctors concerning statements in other medical books. The questions were not allowed. The Supreme Court, as a result, held that the Postmaster General's order should not be enforced by the courts, saying:

> "It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books." 338 U.S. at 275.

Reilly v. *Pinkus,* we think, stands for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field.[4] It is not necessary for the witness to have relied in his testimony upon the particular authority the cross-examiner seeks to use.[5] And we do not think that

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[4] The Court does not say how the authority of those works is to be determined. It seems clear from the facts given in the opinion that it is unnecessary for the witness himself to recognize the authority of the work [but see Lawrence v. Nutter, 203 F. 2d 540 (4th Cir. 1953)] or even to have read it [but see Shaw v. Duncan, 194 F. 2d 779 (10th Cir. 1952)]. We think the authority of the work is for the presiding officer to decide. And we think he should have a broad discretion in determining what—and how much—evidence may be presented on that question.

[5] It has long been accepted that an expert witness may be cross-examined as to an authority he relied upon for his testimony. Garfield Memorial Hospital v. Marshall, 92 U.S. App. D.C. 234, 204 F. 2d 721 (1953); see WIGMORE, EVIDENCE § 1700(b) (3d ed. 1940).

the Court limited its ruling to cases involving fraud.[6] The *Reilly* case also holds that the trial examiner has broad discretion to determine the extent of the cross-examination on written authorities.[7] He probably has, in some cases, discretion to determine whether there should be any such cross-examination at all. But it is error to exclude such questions by blanket rule, without more.

The examiner thus erred in the instant case. The question remains whether reversal is warranted. In deciding *Reilly* v. *Pinkus* the Supreme Court could hardly have intended to bring about reversal of every administrative hearing in which the trial examiner improperly excluded some questions on cross-examination—or in which some other error was made as to the admission or exclusion of evidence. The Court said:

> "The power to refuse enforcement of orders for error in regard to evidence should be sparingly exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency. And what we have said is not to be taken as removing this discretion or as a compulsory opening of the gates for floods of medical volumes, even where shown to be authoritative." 338 U.S. at 276.

But before Reilly v. Pinkus the Circuits were split on whether or not works on which the witness had not relied could be used in cross-examination. Allowed: Victor American Fuel Co. v. Tomljanovich, 232 Fed. 662 (1st Cir. 1916), *cert. denied*, 242 U.S. 643 (1916). Not allowed: E. I. DuPont de Nemours & Co. v. White, 8 F. 2d 5 (3d Cir. 1925); Western Union Telegraph Co. v. Ammann, 296 Fed. 453 (3d Cir. 1924). *Compare* Yarn v. Ft. Dodge D.M.&S.R. Co., 31 F. 2d 717 (8th Cir.), *cert. denied*, 280 U.S. 568 (1929), *with* Woelfle v. Conn. Mut. Life Ins. Co., 103 F. 2d 417 (8th Cir. 1939). And see Mutual Benefit Health & Acc. Ass'n v. Francis, 148 F. 2d 590 (8th Cir. 1945).

[6] See Lawrence v. Nutter, 203 F. 2d 540 (4th Cir. 1953). But see Carter Products v. Federal Trade Commission, 201 F. 2d 446 (9th Cir.), judgment vacated on other grounds, 346 U.S. 327 (1953).

[7] Reilly v. Pinkus, 338 U.S. 269, 276 (1949). See also Lawrence v. Nutter, 203 F. 2d 540, 543 (4th Cir. 1953).

The decision of the Postmaster General was upset in that case with good reason. The works on which the cross-examiner relied apparently were directly relevant to the central issue of the case and were in direct conflict with the Post Office Department's position. As a result they were of great importance to the petitioner. Had the witness been confronted with them and had the conflict been demonstrated to the trier of fact there might well have been a different result. This is especially so as fraud—the good or bad faith of the petitioner—was at issue in the case. The question was not whether petitioner's representations were correct, but whether or not he reasonably considered them correct. See 338 U.S. at 276. A single authority in agreement with petitioner might well be decisive on that issue—although it might be far from proving that the representations were correct. Moreover, on the basis of the hearings an order of extreme severity—restricting petitioner's use of the mails—was imposed. It was with these factors present that the Supreme Court allowed the order of the Postmaster General to be overturned. We think it did so because under the circumstances of the case the restriction of cross-examination denied the petitioner substantial justice.

That was not the case here. Fraud was not at issue. A cease and desist order of the Federal Trade Commission "does not approach the severity of a mail fraud order." *Reilly* v. *Pinkus*, 338 U.S. at 277. And in the instances complained of here the works which petitioners sought to use touched only indirectly on the central issue. An example appears in the cross-examination of Dr. Rosenberg. Petitioners' counsel sought to read a statement in Comroe's *Arthritis* to the witness for his comment. The witness said that the book was a good one, though he would not vouch for everything that was in it, and that the chapter referred to by the cross-examiner was written by a specialist of very fine reputation. Petitioners' counsel said, "I am offering to cross-examine this witness on the

question of the importance of the alleviation of pain in the field of arthritis and rheumatism." Objection was sustained. From petitioners' brief, it appears that the statement sought to be read to the witness was the following:

> "Salicylates are the best of the analgesics in rheumatoid arthritis; aspirin (acetyl salicylic acid) and sodium salicylate are the most commonly used preparations."

This statement seems to us of no significant help to petitioners' case. Most witnesses readily agreed that aspirin was best for relieving the less severe pains of arthritis and rheumatism. Dr. Rosenberg had merely refused to assent to the statement that aspirin was the drug of choice as given by petitioners' counsel—unqualified and divorced from the circumstances of any individual case. And he had said that giving relief from pain was important and helpful in the treatment of rheumatism and arthritis. The value to petitioners' case of a reading of the proposition in Comroe's *Arthritis* was, therefore, slight. The other instances were similar in this respect, and were further weakened by the fact that there was no showing that the works were authoritative or were so regarded by the witness. On the whole record, we cannot say that the trial examiner's rulings on these matters denied petitioners substantial justice, or warrant reversal of the order.[8]

Petitioners allege similar error on the part of the trial examiner when he declined to receive in evidence certain scientific writings. These articles and treatises were offered by petitioners through experts described as "eminently qualified to be fully cross-examined on the science of the field, including the literature to the date of the

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[8] *Compare* FED. R. CIV. P. 61: "No error in either the admission or the exclusion of evidence . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. . . ."

offer." (Br. 52) We assume the writings to be authoritative, and the witnesses to be qualified.

When used to prove the truth of their contents scientific writings are clearly hearsay and are rejected as judicial evidence in all but a few jurisdictions. See *United States* v. *One Device*, 160 F. 2d 194, 198-99 (10th Cir. 1947); 6 Wigmore, *Evidence* § 1690 (3d ed. 1940). Nevertheless, cogent arguments can be made in favor of their use. Such material, as Wigmore has pointed out,[9] is at least as reliable as the ordinary expert's testimony from the stand. It usually is characterized by precise formulation and documentation. Moreover, the ordinary expert when testifying most often relies in whole or in part upon the written works of other experts. The chief objection to the use of scientific articles—and the standard reason for the hearsay rule in general—is that the utterer of the statement (the author) is not subject to cross-examination. Yet that objection may be largely obviated by requiring the introduction of the articles through experts in the field who will, themselves, be subject to cross-examination.

We think authoritative scientific writings can—and should—be freely used by administrative agencies.[10] Such agencies are not bound by the ordinary rules of evidence. Congress has said that "any oral or documentary evidence may be received . . . ." Administrative Procedure Act, § 7(c), 5 U.S.C. § 1006(c) (1952); see also *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 44 (1904); *Bene & Sons* v. *Federal Trade Commission*, 299 Fed. 468, 471 (2d Cir. 1924). Furthermore, the rationale of *Reilly* v. *Pinkus* points toward use of scientic texts in adversary proceedings. But, in line with our interpretation of that case on the issue of cross-examination, we think that an

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[9] 6 WIGMORE, EVIDENCE § 1690 (3d ed. 1940).

[10] Of course, the trial examiner must have a broad discretion to prevent a deluge of repetitive material or material of comparatively small value.

agency's decision should not be reversed by reason of the exclusion of scientific writings unless substantial justice so requires. We would hesitate in most cases to say that a rule almost universal in the courts would, in an administrative proceeding, deny the parties substantial justice. And here the writings in question were not vital to petitioners' case. Lengthy articles were offered on subjects of marginal significance, which had been covered (or could have been covered) by the testimony of witnesses. The record, already of great length, would have been encumbered with a vast amount of miscellaneous learning—some dating back to 1878. We do not think the trial examiner's rulings denied petitioners substantial justice.

An additional point is urged by petitioners: that the trial examiner prematurely closed the hearing, over their objection. We need not enter into a detailed recital of the facts. The first hearing began on March 6, 1950; the last was held on November 13, 1951. During this time, petitioners had asked and received delays totaling many months. Our reading of the record satisfies us that petitioners had ample opportunity to put in their case, and that the trial examiner did not abuse his discretion by closing the hearing when he did.

III.

Petitioners earnestly contend that the provisions of the Commission's order[11] are not adequately supported by the evidence.

At the hearing Dolcin offered considerable testimony in support of its advertising. There was conflicting evidence on many points. But we do not think the Commission resolved the conflict in an unreasonable manner. Subject to what is about to be said concerning paragraph 1(c) of the order, we think the findings and order were supported, on the record as a whole, by substantial evidence. They must, therefore, be upheld, unless they are defective

[11] See note 1, *supra*.

in other respects. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951).

Paragraph 1(c) of the order directs petitioners to cease and desist representing "that said preparation will afford any relief of severe aches, pains, and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches, pains, or fever."

Petitioners urge that this provision is unduly restrictive, in that their product does give a measure of relief that is more than temporary, and in cases of pain that are more than minor. The record contains much to support this position, though it also supports the Commission's finding that Dolcin "will have no significant effect upon severe aches, pains and discomforts" of the conditions involved. The Commission says that petitioners, in complying with the order as written, "are not required to use the word 'temporary.' They can comply by merely avoiding the use of such phrases as 'prolonged relief.'" (Br. 39) Although the Commission does not say so, like reasoning would seem to permit petitioners to avoid using the word "minor." This leaves an undesirable ambiguity. As we recently said: "It seems to us to be better procedure, in that it will eliminate confusion and possible misunderstanding, to modify the order in accordance with a clear statement of its intended meaning, rather than to construe an admittedly ambiguous phrase." *Hamilton Mfg. Co.* v. *Federal Trade Commission,* 90 U.S. App. D.C. 169, 194 F.2d 346 (1952).[12]

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[12] In Rhodes Pharmacal Co. v. Federal Trade Commission, 208 F.2d 382 (1953), the Seventh Circuit had before it an order similar to the present, issued with respect to a drug called "Imdrin," of much the same formula as Dolcin. The court modified the order, but in a manner which we do not consider would be justified on the record in the present case.

We think that there will be less ambiguity, and closer conformity to the Commission's findings, if paragraph 1(c) of the present order is modified to read as follows:

> "that said preparation will afford significant relief of severe aches, pains and discomforts or permanent relief of any aches, pains and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording relief of aches, pains or fever within the foregoing limits;"

Petitioners ask that the Commission's order be amended to preserve the right, under Section 15(a) of the Federal Trade Commission Act,[13] to distribute advertisements to members of the medical profession on a different basis than to the general public. We think this modification should not be made. The provisions of the statute are "necessarily implicit in every order issued under the authority of the Act, just as if the order set them out *in extenso.*" *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 at 476 (1952). Advertising to the medical profession which meets the standards set by Section 15(a) thus remains protected by it, without need of modifying the order.

IV.

Prior to the hearing in this court petitioners moved for leave to adduce additional evidence pursuant to Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45 (c) (1952).[14] We denied the motion at that time "without

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[13] 15 U.S.C. § 55(a) (1952).

[14] ". . . If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. . . ."

prejudice to a renewal at the hearing of this case on the merits." That motion has now been renewed. Petitioners allege that they have available the results of a carefully controlled clinical test of the therapeutic value of the Dolcin formula. This test, they say, was conducted by a well qualified research organization. They also allege that upon request over 300 doctors have used the Dolcin formula and have filled out questionnaires on the results. These questionnaires are now available. We think the terms of Section 5(c) have been fulfilled. The evidence is clearly material. Since there is no indication that it was available at the time of the hearing (or could or should have been made so available), petitioners had reasonable ground for failing to adduce it at that time. That being so, the disposition of the motion is within our discretion. *Cf. National Labor Relations Board* v. *Indiana & Michigan Elec. Co.,* 318 U.S. 9 (1943); *Southport Petroleum Co.* v. *National Labor Relations Board,* 315 U.S. 100 (1942). We think it should be granted. At the time of the original hearing there had been no well controlled tests or large scale surveys run on the efficacy of the Dolcin formula. The instant investigations, therefore, may perhaps be regarded as significant by the Commission. We think petitioners should have an opportunity to present testimony on them to the Commission—though we do not wish to indicate any view as to the weight (if any) which the Commission should attach to them. And nothing in this opinion, of course, should be read as precluding the Commission from hearing any further evidence in the case—beyond that just discussed—which it may wish to consider.

On the other hand, this case has been in contest for a long time. The Federal Trade Commission issued a complaint against Dolcin on August 18, 1949. The hearings, with many delays, lasted until November of 1951. It is now nearing five years since the case arose. As we have said, we think the order of the Commission—as here modi-

fied—is amply supported by the present record. The public interest in the rapid suppression of misleading medical advertisements is obvious. We see no need to delay finalization of the modified order throughout the taking of the additional evidence. Section 5(c) provides that the court may order additional evidence to be taken "upon such terms and conditions as to the court may seem proper." We think a proper condition here is that the order of the Commission—as here modified—become final as though this were a simple affirmance. 15 U.S.C. § 45(g) (1952). If after further hearing the Commission desires to amend its order appropriate steps may be taken looking toward an alteration of our decree, or other proper action on our part.

The order of the Commission will accordingly be

Affirmed, as modified, and the enforcement thereof, as modified, will be ordered; additional evidence shall be taken in accordance with this opinion.

APPENDIX C

(United States Court of Appeals
for the
District of Columbia Circuit
Filed Jul. 1, 1954
/s/ Joseph W. Stewart,
Clerk)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,700
April Term, 1954.

Dolcin Corporation, and Victor Van Der Linde, George Shimmerlik, and Albert T. Wantz, Individually and as Officers of Dolcin Corporation, *Petitioners*,

v.

Federal Trade Commission, *Respondent*.

On Petition for Review of Order of the Federal Trade Commission.

Before: Bazelon, Fahy, and Washington, Circuit Judges.

Decree

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is Ordered by this Court that paragraph 1(c) of the order of the Federal Trade Commission on review in this cause be, and the same is hereby, modified so as to read as follows:

> "that said preparation will afford significant relief of severe aches, pains and discomforts or permanent relief of any aches, pains and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such

condition in excess of affording relief of aches, pains or fever within the foregoing limits."

It is Further Ordered and Decreed by this Court:

(1) that said order of the Federal Trade Commission as hereby modified be, and it is hereby, affirmed;

(2) that said order of the Federal Trade Commission as hereby modified be, and it is hereby, ordered enforced and the petitioners herein are hereby commanded to obey the terms thereof; and

(3) that additional evidence shall be taken by the Federal Trade Commission in this case in accordance with the opinion of this Court.

Dated: July 1, 1954.

Per Curiam.

APPENDIX D

(United States Court of Appeals
for the
District of Columbia Circuit
Filed Nov. 12, 1954
/s/ JOSEPH W. STEWART,
Clerk)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,700
October Term, 1954

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, and GEORGE SHIMMERLIK, and ALBERT T. WANTZ, individually and as officers of Dolcin Corporation, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*

Before: Bazelon, Fahy and Washington, Circuit Judges, in Chambers.

Order

On consideration of the alternative petition filed herein for modification of the opinion, it is

Ordered by the Court that the petition for modification of the opinion be, and it is hereby, denied.

Per Curiam.

Dated: November 12, 1954

(United States Court of Appeals
for the
District of Columbia Circuit
Filed Nov. 12, 1954
/s/ JOSEPH W. STEWART,
Clerk)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,700
October Term, 1954

DOLCIN CORPORATION, and VICTOR VAN DER LINDE, GEORGE SHIMMERLIK, and ALBERT T. WANTZ, individually and as officers of Dolcin Corporation, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent*

Before: Stephens, Chief Judge, and Edgerton, Wilbur K. Miller, Prettyman, Bazelon, Fahy and Washington, Circuit Judges, in Chambers.

Order

On consideration of the petition for rehearing herein before the full Court, it is

Ordered by the Court that the petition for rehearing in banc be, and it is hereby, denied.

Per Curiam.

Dated: November 12, 1954

Chief Judge Stephens and Circuit Judge Wilbur K. Miller are of the opinion that the petition for rehearing in banc should be granted, unless the opinion is modified as prayed in the petition. Chief Judge Stephens will file later a statement of his reasons.

Circuit Judge Danaher did not participate in the foregoing action by the Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,700

DOLCIN CORPORATION, ET AL., *Petitioners*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition for Rehearing in Banc, or, in the Alternative, for Modification, by the Division Which Heard and Decided the Case, of its Opinion*

Filed: February 3, 1955

The petition was denied by a majority of the Circuit Judges in active service on November 12, 1954.

EDGERTON, PRETTYMAN, BAZELON, FAHY and WASHINGTON, *Circuit Judges, in support of their order denying the petition,* filed the following opinion:

We do not consider that petitioners have shown good cause for a further hearing in this case. In so concluding, we have not failed to take note of the matters urged by Chief Judge Stephens. He considers that the court's decision, giving Dolcin an opportunity to present additional testimony before the Commission, could properly be based only on an assumption that the additional evidence would probably bring about a different result before the Commission. We do not agree. Though the evidence is material the court did not decide or intimate that it probably would change the result. The effect of the evidence is for the Commission to decide initially. The requirement as to granting new trials in the courts, namely, that there be a probability that newly-discovered evidence will change the result, is not controlling here. A motion for

* The petition for rehearing reads literally "Petition for Rehearing Before the Full Court, or, in the Alternative, for Modification of Opinion." But the legal meaning is obviously that indicated in the heading.

a new trial in a court upon the ground of newly-discovered evidence is presented to the trial court. That court, familiar at first hand with the trial, can evaluate the probability that the new evidence would affect the result of a trial. An appellate court does not entertain in the first instance such a motion. But, in respect to the proceeding now before us, the statute specifically authorizes us to authorize the receipt of additional evidence, newly discovered, by the Commission. We have no facilities for the complete evaluation of proffered evidence—we have no facilities for even receiving it, and the statute does not authorize us to receive it. We could not say that the evidence would probably change the result of the case, when we cannot even receive the evidence or subject it to cross examination and rebuttal. Moreover, we are an appellate body, not the trial body, and we cannot say whether the new evidence would change the balance of factors in the mind of the trial tribunal. Under this statute the function of the appellate court is to permit the adducement of newly-discovered evidence if upon the whole of the case justice seems to require that the profferer be permitted to present his new evidence to the trier of the facts.

When we have decided that the profferer of newly-discovered evidence deserves an opportunity to present his evidence to the Commission, the question arises whether permission to do so should act as an automatic stay of the Commission's order pending its receipt and consideration of the evidence and decision upon it. That is a separate problem from the problem of permission to present the evidence. It must be decided by balancing the factors pro and con a stay. Here, there have been protracted hearings and consideration. The case involves medical advertisements, which the Commission properly found on a voluminous record to be misleading to the public. For petitioners to obey the Commission's order, and desist from the more extravagant of their claims, might—it is true—cause them to lose some of their profits. In contrast, if the advertising is in fact misleading it may

cause many sick persons to postpone—perhaps irretrievably—more effective treatment, and waste their hopes and funds on petitioners' product. In such a situation, the balance of equities seems clear: the policy of the statute is served by enforcement of the order during the interim. The mere possibility that the petitioners may persuade the Commission to modify its order in some particular should not deprive the public of protection during the period of reconsideration.

We have power to take appropriate action. Section 5(c) of the Act,[1] as our opinion states, permits this court to order additional evidence to be taken "upon such terms and conditions as to the court may seem proper." In addition, it is within our "equity powers" as a reviewing court, see *Ford Motor Co.* v. *Labor Board,* 305 U.S. 364, 373 (1939),[2] to enforce an order of the Commission at this late point in the proceedings unless and until it is set aside or modified. The exercise of such power is comparable to that customarily exercised by a court in granting equitable relief, such as an injunction, notwithstanding further and complete proceedings in court might change the result.

As to the other points made by Chief Judge Stephens, we rest on the opinion previously filed.

STEPHENS, C.J., *in support of his view that the petition should have been granted, filed the following opinion*: This case came before the court on a petition for review of a cease and desist order of the Federal Trade Commission. The Dolcin Corporation and certain of its officials, hereafter referred to as the petitioners, are engaged in the manufacture of a drug called "Dolcin", containing calcium succinate and acetylsalicylic acid (aspirin), designed

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[1] 15 U.S.C. § 45(c) (1952).

[2] "The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers .... The statute with respect to a judicial review of orders of the Labor Relations Board follows closely the statutory provisions in relation to the orders of the Federal Trade Commission ...." 305 U.S. at 373.

to relieve the symptoms of arthritis and rheumatism. The Commission's order substantially restricted the petitioners' advertisements as to the asserted therapeutic effects of the drug. This court, sitting in a division of three, sustained, on the basis of an opinion filed, the order of the Commission, subject only to one modification in favor of the petitioners; and the court authorized the enforcement of the order as modified. But the court at the same time ordered the taking of additional evidence by the Commission. The court also ruled that the denial by the Commission of certain cross-examination attempted by petitioners' counsel was not inconsistent with substantial justice and was therefore, in view of Rule 61 of the Federal Rules of Civil Procedure, not a ground for disturbing the order of the Commission.

The present petition is for rehearing *in banc*, or, in the alternative, for modification, by the division which heard and decided the case, of its opinion.

The petitioners make two contentions. The first is: For this Court of Appeals to require the Commission to consider additional evidence to be introduced by the petitioners and for this Court at the same time to order enforcement of the Commission's cease and desist order, as modified, is such a serious departure from the accepted practice of courts and commissions as to warrant a rehearing *in banc*, unless the opinion is modified in such manner as not to require enforcement of the Commission's order until the new evidence has been adduced and considered by the Commission and the Commission thus given opportunity to make such new or modified findings or recommendations as the additional evidence may require.

I think this contention of the petitioners is correct for the following reasons: In the early history of the development of federal administrative agencies it was thought by some of the federal courts that the silence of the Congress, in statutes creating agencies, on the subject of the rules of evidence and procedure freed the agencies from the so-

called "technical rules" or "strict rules" of evidence, pleading, and procedure; and some state statutes expressly assumed to free local administrative agencies from such rules. But it was ultimately decided in the United States courts that administrative agencies are not relieved from the essentials of the adjective law for the reason that those essentials embrace the essentials to fair hearing contemplated by the due process clause of the Constitution. The rulings of the Supreme Court on this subject are epitomized in *Ohio Bell Tel. Co.* v. *Comm'n.*, 301 U.S. 292, 304, 305 (1037), as follows:

> Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts *when it has been reached with due submission to constitutional restraints. West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 1), *supra*, p. 70; *West Ohio Gas Co.* v. *Public Utilities Comm'n* (No. 2), 294 U.S. 79; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, *that the "inexorable safeguard" (St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38 73) of a *fair and open hearing be maintained in its integrity. Morgan* v. *United States*, 298 U.S. 468, 480, 481; *Interstate Commerce Comm'n* v. *Louisville & N. R. Co., supra.* The right to such a hearing is *one of "the rudiments of fair play" (Chicago, M. & St. P. Ry. Co.* v. *Polt*, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Comm'n (No. 1), (No. 2), supra; Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 682. Cf. *Norwegian Nitrogen Co.* v. *United States, supra.* There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. [Emphasis supplied]

See also *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 276 (1933), where the Supreme Court said:

> * * * Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, *whether its proceedings satisfy the pertinent demands of due process*, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. [Emphasis supplied]

The Federal Trade Commission has in its own rules recognized the force of the quoted rulings. The Commission's Rule 18(a) provides that the trial examiner "shall admit relevant, material and competent evidence, but shall exclude irrelevant, immaterial and unduly repetitious evidence." The Commission's Rule 14(e) provides that the trial examiner "is charged with the duty of conducting a fair and impartial hearing . . . " The Commission's Rule 15(a) provides:

> Every party respondent shall have the right of due notice, cross-examination, presentation of evidence, objection, exception, motion, argument, appeal and all other fundamental rights * * * [The Federal Trade Commission Rules appear in 16 CODE FED. REGS. § 2.3-30 (Supp. 1953).]

One of the fundamentals of fair hearing in the Anglo-American legal system is that *both* sides shall be fully heard before a case is decided and a judgment entered. This means that all of the competent, relevant, material, non-cumulative evidence available to each party shall be heard and considered before the tribunal, whether court or administrative agency, decides. Moreover, the requirement that each party's competent, relevant, material, non-cumulative evidence shall be admitted and considered before a final decision is reached is applicable, subject to

one limitation discussed below, as well to newly discovered evidence not available to a party by the exercise of due diligence during a trial as to evidence available and offered while a trial is in process. A party discovering, after the close of an adjudicatory proceeding, new evidence not discoverable by the exercise of due diligence during the proceeding would as much be denied full hearing by refusal of the tribunal to reopen the case and consider such evidence as if he had during trial met with refusal by the tribunal to hear evidence then offered. Motions for new trial on the ground of newly discovered evidence are provided for by the Federal Rules of Civil Procedure. See Rule 60(b). In *Smith* v. *Pollin*, 194 F. 2d 349 (D.C. Cir. 1952), 90 U.S. App. D.C. 178, this court decided that that rule contemplates a motion for new trial, on the ground of newly discovered evidence, even while an appeal is pending. Moreover, the Federal Trade Commission Act itself provides, in Section 5(b), 38 STAT. 720 (1914), as amended, 15 U.S.C. § 45(b), (1952), for the reopening of a case by the Commission itself at any time before the filing of the record under a petition for review, and provides also, in Section 5(c), 38 STAT. 720 (1914), as amended, 15 U.S.C. § 45(c), (1952), for the adducing of additional evidence before the Commission, after the filing of the record and pending review, upon order of the court of appeals. It is under this section that the court in the instant case ordered the further evidence adduced.

The most recent rulings of the Supreme Court pertinent to the question presently under discussion are *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474 (1951), and *Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498 (1951). Though the essential issue raised in those cases was as to the effect of the Administrative Procedure Act and of the Taft-Hartley Act upon the duties of a United States Court of Appeals when called upon to review orders of the National Labor Relations Board, the rulings are apt in respect of the standards of judicial review in appeals from orders of federal boards, commissions, and agencies

generally. With respect to such standards of judicial review the Court said, *inter alia:*

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision *merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn,* the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.
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> * * * *
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> Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that *the record in its entirety* furnishes, including the body of evidence opposed to the Board's view.
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> * * * *
>
> We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, *on the record as a whole,* by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.
>
> * * * *

> Whether on *the record as a whole* there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. [340 U.S. 474, 487, 488, 490, and 491 (1951)] [Emphasis supplied]

Since under the foregoing rulings of the Supreme Court a federal court of appeals cannot properly sustain a decision of an administrative agency or board unless there is substantial evidence on the record as a whole to support the agency's findings, it follows that the agency or board itself cannot properly decide a case by considering only a part of the evidence in the record before it. *A fortiori*, it cannot, subject to the limitation discussed below, properly decide a case on a record which is incomplete because newly discovered evidence of competent, relevant, material, non-cumulative character not obtainable by the exercise of due diligence during the tribunal's hearing is still to be adduced. It follows from the foregoing that a court cannot properly—as this court has assumed to do in the instant case—enforce an agency decision based upon a record which is incomplete because such newly discovered evidence has not yet been considered.

There is but one limitation upon the duty of a court or commission to reopen for newly discovered competent, relevant, material, non-cumulative evidence, to wit, that evidence must be of such character as will probably bring about a result different from that reached by the tribunal without such evidence. This proposition is so elementary in respect of courts that a reference to mere general authority is sufficient to support it. See 39 Am. Jur., New Trial § 165:

> To constitute sufficient ground for a new trial, newly discovered evidence must not only be relevant and material to the principal issues in the case, . . . but must be sufficiently strong to make it probable that a

> different result would be obtained in another trial. The new evidence must be of a decisive and conclusive character, or at least such as to render a different result reasonably certain. . . . [Footnotes omitted]

Numerous cases are cited to this effect. Since this is the rule in respect of courts, *a fortiori* an administrative agency ought not be required to reopen a proceeding and hear additional evidence unless such evidence will probably bring about a result different from that reached without it.

The division of this Court of Appeals which decided the instant case—in ordering the proffered newly discovered evidence adduced before the Commission—described the evidence as "clearly material." It also said that there is no indication that the proffered evidence was available at the time of the hearing or that it could or should have been made so available, and the court therefore ruled that the petitioners had reasonable ground for failing to adduce it at the time of the hearing before the Commission. Although the court said in its original opinion that it did not wish to indicate any view as to the weight which the Commission should attach to the newly discovered evidence, and although the court says in its supplemental opinion that it did not decide or intimate that the newly discovered evidence would probably alter the result which the Commission had reached without it, I think the court should have reached a decision not only that the evidence was competent, relevant, material and non-cumulative, but also such evidence as would probably alter the result which the Commission had reached without it; otherwise the court was not justified in requiring the Commission to take the time to hear the additional evidence and the petitioners to go to the expense of the further proceeding.

That the court could properly have concluded that the newly discovered evidence was competent, relevant, material and non-repetitious and that it would probably change

the result which the Commission had reached without it, is amply shown by the nature of the proffered evidence itself, as described by the petitioners, in relation to the findings and rulings of the Commission: In this case the Commission charged the petitioners with false and misleading advertising of material character concerning the therapeutic value, for the relief of the symptoms of arthritis and rheumatism, of Dolcin. Much of the evidence in the case as tried before the Commission had to do with the comparative therapeutic effects of acetylsalicylic acid alone (aspirin) orally administered and of calcium succinate combined with acetylsalicylic acid (Dolcin), also administered orally. There was evidence to the effect, and the Commission found, that calcium succinate administered orally rather than intravenously is therapeutically inoperative, and that therefore the only active ingredient contained in Dolcin is the acetylsalicylic acid. The Commission found that "The drug preparation 'Dolcin', however taken, will not ameliorate the aches, pains and discomforts of any arthritic or rheumatic condition to any extent beyond the temporary relief thereof afforded by its salicylate content as an analgesic and antipyretic." The Commission also found that "Since the only therapeutically operative ingredient in the drug preparation 'Dolcin' is acetylsalicylic acid, commonly known as aspirin, and since the retail selling price, without prescription, of 100 tablets of the drug preparation 'Dolcin' is $2.00 whereas that of 100 tablets of a well-known brand of aspirin is 59¢, while many other brands of aspirin sell for less, the drug preparation 'Dolcin' is not economical, inexpensive, or of low cost." It was in view of these findings that the Commission's cease and desist order in paragraph (c) restrained the petitioners from advertising:

> that said preparation will afford any relief of severe aches, pains, and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition or have any therapeutic effect upon any of the

> symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches, pains, or fever;

The court modified this order so that it restrained the petitioners from advertising:

> that said preparation will afford significant relief of severe aches, pains and discomforts or permanent relief of any aches, pains and discomforts of rheumatic fever, fibrositis, myositis, neuritis, sciatica, lumbago, bursitis, or any other kind of arthritic or rheumatic condition, or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording relief of aches, pains or fever within the foregoing limits;

It was further in view of these findings that the Commission's cease and desist order in paragraph (g) restrained the petitioners from advertising that the preparation Dolcin is economical, inexpensive, or of low cost unless the retail selling price shall be less than the retail selling price of its only active ingredient, to wit, acetylsalicylic acid, commonly known as aspirin.

The newly available evidence is of two classes: One class includes data secured through a survey of the recorded results of treatment of patients for arthritic and rheumatic conditions; the other class includes data obtained from a controlled clinical investigation carried on by a qualified and recognized research organization. The class of evidence first referred to was obtained by a survey made by Pan Pharmacals, Inc., a concern distributing, under license from the Dolcin Corporation, a succinate-salicylate formulation, carrying the brand name "Ber-Ex", of the identical composition of Dolcin tablets. Letters were addressed by Pan Pharmacals, Inc. to more than 300 doctors asking each recipient whether he would be willing to test the efficacy of Ber-Ex in the treatment of arthritis and rheumatism by selecting from among his patients "the two that hold special interest for you." In the same letter it was stated that those who would agree would be fur-

nished Ber-Ex free of charge in the quantity required to treat those two patients "to a point where you can reach a definite conclusion as to its merits." This was further conditioned on the promise by the doctor that he would make careful observation of the effect of the drug on his patients and would record and report the data thus obtained by filling in the blanks of a form submitted to him. More than 300 doctors reported on more than 400 cases by filling in the answers to the questions in the form. Three-hundred-nineteen doctors recorded their answer to the last question, namely, "How does Ber-Ex compare with other therapies you have used in cases of this type?" as follows:

Superior to other types	71.5%
As good as other therapies	24.8%
Not as good as other therapies	3.7%

The answer "superior to other types" must fairly be assumed to include a reference to aspirin since it is a drug commonly used in the treatment of arthritis and rheumatism. The results of this survey will be available for presentation at the hearing before the Commission, and many of the doctors will be available as witnesses.

As to the second class of evidence: Pan Pharmacals, Inc. also engaged the services of a qualified and recognized research organization to test clinically the therapeutic value of its succinate-salicylate formulation. Ber-Ex, in treating arthritic and rheumatic conditions, and to compare its efficacy with that of aspirin alone, all under proper controls of such tests. Again a form was supplied which supervising doctors were required to fill in periodically when making observations. The doctors were required to make at least five follow-up examinations on each patient. The form used in connection with this second class of evidence called for data on the basis of which experts might judge whether the preparation Ber-Ex does or does not have any value in the treatment of arthritic

and rheumatic conditions, and will clearly show the relative value of the two drugs to be tested and compared.

If the proffered evidence, when introduced before the Commission, is found—when considered with all of the other evidence—to result in a preponderance favorable to the petitioners on the issues in question, it will require modification of the Commission's finding that calcium succinate is inoperative when orally, rather than intravenously, introduced and that Dolcin is not more effective therapeutically than aspirin, and it will therefore also require modification of the finding of the Commission that Dolcin is over-priced as compared with aspirin. It will require also modification, or possibly elimination, of paragraph (g) of the Commission's cease and desist order, as described above, and will also require modification of paragraph (c) of the Commission's order, as modified by the court, if the Commission is convinced by the evidence that Dolcin does give significant relief from severe aches, pains and discomforts. It is apparent that the proffered evidence attacks the essence of a substantial portion of the Commission's case for a cease and desist order.

It is especially to be noted that although the Commission resisted the petitioners' motion to adduce additional evidence it did not, so far as the briefs show, ask for enforcement of its order prior to the reception of the new evidence, should the motion to adduce be granted.

I disagree with the view of the court stated in its supplemental opinion that under the Federal Trade Commission Act the function of the appellate court is to permit the adducement of newly discovered evidence "if upon the whole of the case justice seems to require that the profferer be permitted to present his new evidence to the trier of the facts." I find nothing in the Act itself which so defines the function of the appellate court. In my view, neither a court nor a commission properly reopens for additional evidence unless that evidence when received will probably change the result. In administrative agency cases the procedure prescribed for the ad-

ducing of newly discovered evidence is, of course, different from that prescribed for court cases. In the latter, the opportunity, after the completion of a trial, to introduce newly discovered evidence is secured through a motion for new trial addressed to the trial court itself, not to the court of appeals. But under the federal administrative agency statutes, including the Federal Trade Commission Act, not only may motions be made for rehearing before the agencies themselves, but also motions to adduce additional evidence may be made in the courts of appeals. This, in my view, places a responsibility upon such courts, when their power is invoked, to determine whether or not the proffered evidence is competent, relevant, material and non-cumulative, and such as will probably change the result. This does not mean that the courts of appeals must themselves hear the proffered evidence[1]; but they must give sufficient attention to the description of the evidence in the motion to adduce and in the briefs in support thereof and in opposition thereto to make that determination. In the instant case this court received written briefs on this subject and heard oral argument.

The second contention of the petitioner is, in effect, that the ruling of the court, referred to above, in respect of

[1] The assumption of the court that on motions for new trial upon the ground of newly discovered evidence trial courts customarily hear the proffered evidence and subject it to cross-examination and rebuttal is, in my view, not correct. The prevailing practice in trial courts appears to be to consider the proffered evidence on the basis of a description thereof in written statements or in affidavits. See 6 MOORE, FEDERAL PRACTICE ¶ 59.08 [3] (2d ed. 1953); 10 CYCLOPEDIA OF FEDERAL PROCEDURE § 34.05 (3d ed. 1952); 66 C.J.S. New Trial § 184; 39 Am. Jur., New Trial § 162.

Apparently a similar practice prevails in commissions. See 49 CODE FED. REGS. § 1.101(b) (1949) [Interstate Commerce Commission]; 18 CODE FED. REGS. § 1.34 (1949) [Federal Power Commission]; 14 CODE FED. REGS. § 302.37(b) (1952) [Civil Aeronautics Board]; 17 CODE FED. REGS. § 201.12(d) (1949) [Securities and Exchange Commission].

denial of cross-examination involves a misapplication of Rule 61 of the Federal Rules of Civil Procedure and involves such a serious departure from the requirements of fair hearing as to warrant a rehearing *in banc,* unless the opinion is modified, by the division which heard and decided the case, in such manner as to permit the cross-examination on a further hearing of this case before the Commission. This contention arises out of the following: On direct examination opinion testimony of doctors called by the Commission was to the effect that the advertised product, "Dolcin", was not efficacious in respect of arthritis and rheumatism beyond affording temporary relief from minor symptoms. Counsel for the petitioners sought to cross-examine the doctors thus testifying by confronting them with contradictory medical opinions by reputable authorities published in reputable scientific journals; thereby, petitioners' counsel was attempting to obtain a modification by the witnesses of their testimony on direct examination. The trial examiner forbade this cross-examination and excluded from the evidence the scientific journals offered as a part of the cross-examination. The Commission affirmed the ruling of the examiner. This court in its opinion rules that while it was error for the Commission's examiner thus to limit the cross-examination, the examiner's ruling did not deny the petitioners substantial justice nor warrant reversal of the order. The court's ruling is based upon Rule 61 of the Federal Rules of Civil Procedure which provides that "No error in either the admission or the exclusion of evidence . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice . . ."

The petitioners contend that this Rule contemplates a completed record from the four corners of which it may be determined whether or not reversal is warranted by the errors as recorded; that the character of the excluded evidence contemplated by the Rule must be shown

in the record; that the Rule cannot address itself to unknown matters *outside* of the record, such as "unanswered questions," because any determination of so-called "harmless error" on matters never adduced is speculative, since the harmfulness or harmlessness of the error must be determined on the basis of guessing what the witness might have answered had the unlawful exclusion not occurred. I think this contention is correct. How can it be known by this court what the doctors who testified on direct examination would have said upon being confronted by the scientific journals and upon being questioned concerning them? Of course, they might not have modified their testimony. But, on the other hand, they might have modified it to some degree, or even substantially, and as a result the Commission's ultimate order might have been a materially different one. Cross-examination upon material issues is a right; it is only the extent of it which is within the discretion of the trial officer. This is recognized by the court in its ruling that the trial examiner's forbidding the cross-examination and excluding the scientific journals proffered as a part thereof was erroneous. In my view speculation as to what the answers of the doctors might have been cannot satisfy Rule 61. The following authorities seem to me to be controlling: *Reilly* v. *Pinkus,* 338 U.S. 269 (1949), opinion by Mr. Justice Black; *Garfield Memorial Hospital* v. *Marshall,* 204 F. 2d 721 (D.C. Cir. 1953), 92 U.S. App. D.C. 234, opinion by Judge Wilbur K. Miller; *Hastings* v. *Chrysler Corporation,* 273 App. Div. 292, 77 N.Y. Supp. 2d 524 (1st Dep't. 1948), opinion by Judge Shientag; *Lawrence* v. *Nutter,* 203 F. 2d 540 (4th Cir. 1953), opinion by Judge Soper; *Lindsey* v. *United States,* 133 F. 2d 368 (D.C. Cir. 1942), 77 U.S. App. D.C. 1, opinion by Stephens, Associate Justice, concurred in by Associate Justice Rutledge, Associate Justice Edgerton dissenting.

It is noteworthy that the Commission has not opposed the present petition for a rehearing *in banc,* or, in the

alternative, for a modification, by the division which heard and decided the case, of its opinion. The Commission apparently does not now seek to justify the court's ordering the cease and desist order enforced but at the same time granting the motion to adduce and requiring the Commission to hear the proffered additional evidence; and the Commission seems not now to seek to justify the denial of cross-examination above described or to urge that it was harmless error.

The only exception to the requirement of full hearing before decision by a court or administrative agency and enforcement of its judgment or order is in the use of preliminary or temporary injunctions in the public or private interest, with the opportunity to a party subjected to such an injunction to be protected by bond except in cases in which the United States is the plaintiff. There is provision in the Federal Trade Commission Act for the issuance by a district court of a temporary injuncton or restraining order, in the public interest, upon application by the Commission and upon a proper showing. See Section 13 of the Act, 52 STAT. 115 (1938), 15 U.S.C. § 53 (1952). But in the instant case the Commission has at no stage of the proceeding invoked this injunctive power. If the Commission itself did not see fit to ask the district court to enjoin, pending the Commission proceeding, the advertising charged to be unlawful, it is hardly for this court in effect to enjoin the advertising and to do so *sua sponte*. Indeed, for the court to do so is for the court to assume a power conferred not upon it but upon the district court.

I think this court should not set a precedent in the field of administrative law and procedure permitting, apart from any use of the temporary injunction or restraining order process available to the Commission upon application and proper showing to a district court, the enforcement of an order on an incomplete record—a precedent which in effect permits treating an order both ways at the same

time, *i.e.*, treating it as valid for the purpose of enforcement but as not valid for lack of full hearing of all of the available competent, relevant, material, non-cumulative evidence; and a precedent which permits an order to stand in the face of a clear denial of the right of cross-examination. The case of *Ford Motor Co.* v. *Labor Board,* 305 U.S. 364 (1939), cited by the court in its supplemental opinion, does not, in my view, support the position of the court that the order of the Commission in the instant case should be enforced notwithstanding the fact that the case is remanded for consideration of the newly discovered evidence. In the case cited the remand, by the United States Court of Appeals for the Seventh Circuit, for further proceedings was made without enforcement of the Labor Board's order; the Court of Appeals did not rule upon the validity of the order.

I would therefore grant the petitioners' petition for rehearing *in banc* unless, in the alternative, the division which heard and decided the case modifies its opinion in the particulars above commented upon.

I am authorized to state that Circuit Judge Wilbur K. Miller concurs in this opinion.

Circuit Judge Danaher took no part in this case.

Circuit Judge Bastian, who took office after the petition was denied, took no part in this case.

APPENDIX E

Statute Involved

Federal Trade Commission Act, 38 Stat. 717, 15 U.S.C.A. §§ 41 *et seq.*

Section 5(c), 15 U.S.C.A. § 45(c)—

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to

the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28."

Section 13(a), 15 U.S.C.A. § 53(a)

Section 13(a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 585

DOLCIN CORP. ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21–34), and the majority and dissenting opinions of the court on petition for rehearing *en banc* (Pet. App. 39–57), have not yet been reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35–36) was entered on July 1, 1954. A timely petition for rehearing *en banc,* or alternatively for modification of the opinion, was denied on November 12, 1954 (Pet. App. 37–38). The

petition for writ of certiorari was filed on February 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the hearing examiner's refusal to permit petitioners to cross-examine expert medical witnesses concerning statements in medical writings upon which the witnesses had not specifically relied in forming their opinions required reversal of a Federal Trade Commission cease-and-desist order.

2. Whether a reviewing court which directs, pursuant to Section 5 (c) of the Federal Trade Commission Act, that additional evidence be taken before the Commission, has the power to enforce the Commission's order notwithstanding the taking of such additional evidence.

3. If question 2 is answered affirmatively, whether the court abused its discretion in this case by enforcing a Commission cease-and-desist order directed against misleading medical advertisements.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or

practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) * * * After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside.

* * * Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken,

and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. * * *

STATEMENT

In August, 1949, the Federal Trade Commission issued a complaint (J. A. 8–15) under Section 5 of the Federal Trade Commission Act charging that petitioners had engaged in unfair and deceptive acts and practices by disseminating false and misleading advertisements in connection with the sale of their drug "Dolcin" as a treatment for arthritis and rheumatism. After extensive administrative proceedings, including a hearing extending over 20 months at which 17 medical expert witnesses testified, the Commission in December, 1952, issued its findings and opinion holding that respondents had engaged in such practices, and issued a cease and desist order prohibiting the misrepresentations (Pet. App. 1–20).[1]

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[1] This is one of several cases brought by the Commission to put an end to false and misleading advertising in the sale of medical preparations for use in the treatment of arthritis and rheumatism. The complaint against Rhodes Pharmacal Co., for example, was issued at the same time, involved a product ("Imdrin") of much the same formula as "Dolcin", and resulted in an order similar to that in the instant case. See *Federal Trade Commission* v. *Rhodes Pharmacal Co.*, No. 80, O. T. 1954, decided February 14, 1955.

The Commission found that petitioners' advertisements contained such statements and representations as the following (Pet. App. 4–9):

> *Is DOLCIN just another palliative* * * * *a product for relieving pain for a few hours?* The answer is very definitely that DOLCIN is *not* just a palliative masking pain and discomfort for a few hours. DOLCIN is designed to Relieve Pain Promptly but, also, the DOLCIN treatment is directed to the disturbances in metabolism which are a very important part of the background of the Rheumatic State, and is designed to give prolonged relief from symptoms.
>
> * * * * *
>
> * * * People who have suffered from these afflictions *for years,* report they have resumed normal occupations after taking DOLCIN. There's a scientific explanation for this. DOLCIN is more than just a pain killer—in many cases, DOLCIN actually results in prolonged remission of stiffness and discomfort. * * *
>
> * * * * *
>
> As acetylsalicylic acid in DOLCIN is non-toxic, DOLCIN should be used instead of aspirin.

The Commission found, *inter alia,* that, according to the greater weight of the evidence, none of the ingredients of Dolcin other than aspirin had any value in connection with arthritic and rheumatic conditions, that the only value of aspirin

taken in this connection was that it provides temporary relief from the less severe pains and fever, and that aspirin does not relieve stiffness and swelling accompanying these conditions. The Commission further found that the aspirin in Dolcin has exactly the same effect as if taken alone, and that persons adversely affected by aspirin would be similarly affected by Dolcin.

The Commission's order (Pet. App. 16–17), *inter alia,* directed petitioners to cease representing directly or by implication that Dolcin was an effective and reliable treatment of or would cure arthritic or rheumatic conditions, restricted the permissible claims as to the relief afforded by Dolcin, and prohibited representations that it may be safely taken over prolonged periods of time and that it may safely be taken by persons adversely affected by aspirin.

During the administrative hearings, the Commission called a number of expert medical witnesses who testified as to the use of salicylates in the treatment of arthritis and rheumatism. In a few instances, the examiner refused to permit petitioners' counsel to interrogate these witnesses on cross-examination with respect to opinions expressed in medical writings upon which the witnesses had not relied in forming their opinions, and most of which were not shown to be authoritative or recognized by the witnesses as such. The Commission affirmed the rulings, on the ground that the contents of a medical article

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could not be read into the record on cross-examination of an expert medical witness stating a contrary opinion "unless the article is relied on by the witness in reaching his opinion or he admits the article is authoritative on the subject or denies the existence of medical opinion contrary to his stated opinion" (J. A. 78).

On petition for review the court of appeals unanimously held that the Commission's findings were supported by substantial evidence, that there was no showing that the examiner's rulings on the evidence "denied petitioners substantial justice, or warrant reversal of the order", and, with one exception not here material, affirmed and enforced the Commission's order. The court also granted a motion by petitioners to adduce additional evidence [2] before the Commission, but declined to delay enforcement of the order pending the taking of such evidence. (Pet. App. 21–34.)

A petition for rehearing *en banc* (or alternatively for modification of the opinion) was denied by a majority of the court (Judges Edgerton, Prettyman, Bazelon, Fahy, and Washington) (Pet. App. 37–39). Judge Stephens (with whom Judge Miller concurred) dissented (Pet. App. 41–57).

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[2] The additional evidence was stated to consist of the results of a "carefully controlled clinical test of the therapeutic value" of Dolcin, and questionnaires filled out by more than 300 doctors who have used the product.

ARGUMENT

1. Petitioners' attack on the refusal of the court below to set aside the Commission's order, on the ground that the trial examiner erred in limiting cross-examination of the Commission's witnesses with respect to medical writings on which they had not specifically relied, presents no question of general importance warranting review by this Court.[3] The court's conclusion that in the circumstances of this case there was no showing that the examiner's rulings denied petitioners substantial justice or warranted reversal of the order is correct.

Petitioners rely on *Reilly* v. *Pinkus,* 338 U. S. 269. In that case the court set aside a post office mail-fraud order because the respondent had been denied the right to cross-examine the Govern-

[3] The court of appeals held that the examiner's refusal "by blanket rule" to permit such cross-examination constituted error because it viewed *Reilly* v. *Pinkus*, 338 U. S. 269, as standing "for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field," even thought the witness did not rely in his testimony "upon the particular authority the cross-examiner seeks to use" (Pet. App. 25). Although we do not think that *Reilly* v. *Pinkus* lays down any hard and fast rule, particularly in cases such as this where fraud is not involved (see pp. 9–10, 12–13; *cf. Carter Products, Inc.* v. *Federal Trade Commission*, 201 F. 2d 446, 448–449 (C. A. 9), reversed on other grounds, 346 U. S. 237), this Court need not reach this issue inasmuch as the court below held that the error it found did not warrant reversal of the order.

ment's medical witnesses with respect to medical writings. In so doing it stressed that a mail-fraud order, unlike a Federal Trade Commission cease-and-desist order to which it was explicitly contrasted (p. 277), cannot be based upon a finding that "an incorrect statement was made," but requires an "actual intent to deceive" (p. 276); that an intent to deceive "might be inferred from the universality of scientific belief that advertising representations are wholly unsupportable"; and that the likelihood of such an inference "might be lessened should cross-examination cause a witness to admit that the scientific belief was less universal than he had first testified" (*ibid.*).

In the instant case, none of these factors was present. The court sustained the Commission's findings that petitioners' advertising was false and misleading, in respects here relevant, as based on substantial evidence (Pet. App. 30). It observed (Pet. App. 27–28) that the medical works which petitioners sought to use "touch only indirectly on the central issue" in the case, that the value to petitioners' case of the works was "slight," and that many of them were not shown to be "authoritative" or so regarded by the witnesses. The court, therefore, concluded (Pet. App. 28) that "[o]n the whole record" there was no showing that the examiner's rulings "denied

petitioners substantial justice, or warrant reversal of the order."

Petitioners argue (Pet. 8–10) that the court's conclusion was based on "speculation," because the examiner's blanket rejection of the line of questioning prevented the court from examining the proffered material to determine whether its exclusion was prejudicial.[4] But petitioners merely sought to use this material to test the validity of the witnesses' opinions, and the record indicates the character of this material and the purpose for which petitioners sought to use it. The court thus had an adequate basis for determining that its exclusion was harmless error.

For example, the examiner sustained an objection (J. A. 253–254) to petitioners' attempt to cross-examine Dr. Rosenberg as to whether he agreed with the statement in *Comroe's Arthritis* that salicylates are the best of the analgesics in

[4] Petitioners quote (Pet. 9–10) brief excerpts from five articles about which, they state, they wished to cross-examine the witnesses, and which allegedly contradict the witnesses' testimony. But these excerpts are taken out of context, and examination of the complete articles shows that they refer to the use of salicylates merely as one of a number of therapeutic measures recommended for the treatment of arthritis and rheumatism. Moreover, the quoted passages do not suggest that salicylates will relieve severe pain or other symptoms or manifestations of arthritis or rheumatism—a central issue in the case about which the witnesses testified—but only that they are generally used for pain relief.

the treatment of rheumatoid arthritis.[5] This instance is stressed by petitioners (Pet. 8–9) and is typical of the exclusions complained of. At the hearing petitioners' counsel stated (J. A. 254) that the purpose of this question was to test Dr. Rosenberg's opinion as to the importance of relieving pain in the treatment of arthritis and rheumatism. However, Dr. Rosenberg already had testified (J. A. 252–253) that relief of pain is important in the treatment of these conditions, and that salicylates are widely used by doctors for that purpose. Under these circumstances, there was an adequate basis in the record for the court's conclusion (Pet. App. 27–28) that the material which petitioners sought to use "touched only indirectly on the central issue"—whether Dolcin relieves severe pain and other arthritic and rheumatic symptoms including stiffness and swelling, had only "slight" value to petitioners' case, and accordingly did not warrant reversal of the order.

The judgment of the court below thus accords with the rationale of *Reilly* v. *Pinkus, supra,* that

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[5] The excerpt from this work which the court quotes (Pet. App. 28) is directly preceded by the following statement:

"The physican must attempt to relieve pain in the patient with rheumatoid arthritis. * * * Such relief is brought about by suitable splinting, rest and physical therapy as described above. It is also accomplished *in part* by salicylates and other analgesics." [*Comroe's Arthritis*, p. 238; emphasis added.]

whether restrictions upon cross-examination constitute harmless error depends upon the facts of the particular case. *Cf. California Lumbermen's Council* v. *Federal Trade Commission,* 115 F. 2d 178, 183–184 (C. A. 9). There is no conflict of decisions.[6] Moreover, in affirming the Commission's order, the court below was mindful of this Court's admonition (*Reilly* v. *Pinkus,* 338 U. S. at 276) that:

> The power to refuse enforcement of orders for error in regard to evidence should be sparingly exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency. And what we have said is not to be taken as removing this discretion or as a compulsory opening of the gates for floods of medical volumes, even where shown to be authoritative.

There is therefore no occasion for further review of this question by this Court.

2. Petitioners contend that the court of appeals lacked power to enforce the Commission's order because it, at the same time, granted petitioners' motion to adduce additional evidence before the Commission, and that, in any event, the court

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[6] The three court of appeals cases which petitioners cite as in conflict with the decision below (Pet. 11–12) turn on their particular facts. They do not stand for any general proposition respecting reversal of agency orders for improper restriction of cross-examination.

abused its discretion by directing enforcement of the Commission order under these circumstances. We think, on the contrary, that this case presents an appropriate exercise of the powers conferred on courts of appeals as reviewing courts by Section 5 of the Federal Trade Commission Act.

A. The court's power, in an appropriate case, to enforce an order of the Federal Trade Commission in the circumstances here presented rests both on its general equity powers as a reviewing court, and on the specific provisions of Section 5 (c) of the Federal Trade Commission Act.

Section 5 (c) of the Act explicitly provides that a court of appeals may order "additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper." We think, as the court below held (Pet. App. 34, 41), that this broad language authorizes the court in an appropriate case to direct, as a reasonable prescription of the terms and conditions upon which "additional evidence [is] to be taken before the Commission," that the order be enforced in the interim.

Section 5 (c) also authorizes the court, as an incident to its review of Commission orders, "to issue such writs as are ancillary to its jurisdiction *or are necessary in its judgment to prevent injury to the public* or to competitors pendente lite." [Emphasis added.] Under this

provision the court could itself have enjoined petitioners during the supplemental hearing from making the misrepresentations which the Commission order prohibits. It could have done so by finding such action necessary to protect the public against false and misleading claims in medical advertisements—the same finding upon which the court's refusal to postpone enforcement was based (see Pet. App. 34). The court's power to protect the public could hardly be less when exercised pursuant to its authority to impose such terms and conditions upon the taking of additional evidence "as to the court may seem proper" than when it issues a writ "necessary in its judgment to prevent injury to the public." Indeed, we think that the court's power to issue ancillary writs itself fully supports the enforcement order in this case, even though the court did not specifically refer to this provision.

The court's power to direct enforcement also rests on its general " 'equity powers' as a reviewing court" (Pet. App. 41).[7] As the court stated in its opinion denying rehearing, these powers authorize it "to enforce an order of the Commission at this late point in the proceedings unless and until it is set aside or modified. The exercise of such power is comparable to that customarily

[7] See *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373.

exercised by a court in granting equitable relief, such as an injunction, notwithstanding further and complete proceedings in court might change the result" (*ibid.*).

The court of appeals granted petitioners' motion to adduce additional evidence because, in the words of Section 5 (c) of the Federal Trade Commission Act, it found that "such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission." But in so doing the court did not suggest, as petitioners assert (Pet. 14, 15; see question II (a), Pet. 3), that the proffered evidence rendered the existing administrative record "incomplete." On the contrary, it expressly found (Pet. App. 34) that the modified order was "amply supported by the present record," and stated that it did not "wish to indicate any view as to the weight (if any) which the Commission should attach" to it (Pet. App. 33). Specifically, the court reiterated, in its opinion on rehearing, that it "did not decide or intimate that [the additional evidence] probably would change the result" (Pet. App. 39).

The order which the court enforced is based upon a full record. There can be no valid claim here that petitioners were denied a fair hearing on the ground that the Commission entered the

order without having received all pertinent evidence which was offered. A full record having been made when the Commission entered the original order, we think it clear that the court had the *power* to enforce the order pending the taking of additional evidence.

B. Petitioners' contention that the court abused its *discretion* by directing enforcement is also without merit.

The court below noted that the case had been in progress more than five years and that, in the course of the hearings which extended over twenty months, "petitioners had asked and received delays totaling many months" (Pet. App. 30). The Commission had found that the claims which petitioner had made, certain of which petitioner still insists it should be free to make (see Pet. 6, 19), were false and misleading. The court held that the Commission's order was "amply supported by the present record" and noted the commanding public interest in the "rapid suppression of misleading medical advertisements" (Pet. App. 33–34). Moreover the court noted (Pet. App. 40–41) that if petitioners were required to obey the order it might cause some loss of profits, whereas if the advertising is misleading its continuation may cause many sick persons to postpone, perhaps irretrievably, more effective treatment and to waste their hopes and funds on

petitioners' product.[8] The court concluded (Pet. App. 41) that the balance of equities was "clear: the policy of the statute is served by enforcement of the order during the interim. The mere possibility that the petitioners may persuade the Commission to modify its order in some particular should not deprive the public of protection during the period of reconsideration." It was thus the public interest which dictated its judgment of enforcement. *Cf. Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 15. Under these circumstances, we think that it was within the "sound judicial discretion of the court"[9] to rule that the order should be enforced notwithstanding the taking of additional evidence which, together with the further administrative proceedings, will require many months. Of course, as the court below noted (Pet. App. 34), "if after further hearing the Commission desires to amend its order appropriate steps may be taken looking toward an alteration of [the court's] decree."

[8] Petitioners argue (Pet. 17, 19), again on the basis of isolated and out-of-context quotations from certain medical writings, that the public would not be unfairly treated if it purchased Dolcin on the basis of petitioners' representations as to its therapeutic properties, which the Commission found were false. This contention is but another way of stating the argument that the Commission's order prohibiting such misrepresentations is without adequate evidentiary support—a contention which the court rejected.

[9] Cf. *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, 104.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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